

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For the Period
From April 1, 1964
Through June 30, 1964
VOLUME 115

RICHMOND M. FLOWERS, Attorney General



QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1964 through June 30, 1964, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS

Attorney General

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OPINIONS

April 2, 1964

Mrs. Elizabeth Parks Beamguard
Director

Alabama Public Library Service

C A P I T O L

Libraries — Alabama Public Library Service — Alabama
Building Commission.

Powers and Responsibilities of Alabama Public Library
Service and Alabama Building Commission discussed as to
construction of Public Libraries built with State and Federal
matched funds.

Opinion by Assistant Attorney General Clark.

Dear Mrs. Beamguard:

Your request for an official opinion, bearing date of March 23,
1964, is as follows:

"The preparation of a State Plan for Public Library Construction
requires that we seek an official ruling on certain aspects of the law
which we have previously had no reason to explore.

"Alabama Public Library Service may now qualify, by matching,
for Federal funds for the construction of buildings, or for the possible
renovation of buildings to be used for public libraries.

"Since there is no State appropriation for construction, our matching
funds would be funds appropriated by local governmental units
(county, municipal).

"What is the relationship of Alabama Public Library Service to the
Alabama Building Commission with respect to such a building
program?

"What is the extent of Alabama Building Commission's power and
responsibility with respect to approval and/or supervision of said
projects?

"Since the completion of our State Plan depends upon your ruling,
we shall be deeply grateful for your immediate consideration."

Act No. 600, General and Local Acts 1959, Page 1488 (Title 55,
Section 280, Code of Alabama 1940, as amended) provides, in part, as
follows:

"Section 280. . . . The service may receive and shall administer all funds, books or property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purpose of this article; . . ."

The above section gives the Alabama Public Library Service the right to receive these funds and the duty to administer them.

Title 55, Section 367(2), Code of Alabama 1940, as amended, in providing for the power and authority of the Alabama Building Commission sets out:

"Section 367(2) Power and Authority of Commission. — The commission shall have full power and authority for and on behalf of the State of Alabama . . . to plan buildings and designate the location thereof; to plan and provide for the improvement of all property now owned or hereafter acquired by the state or any institution or agency thereof; . . ."

The building commission is authorized and directed to enforce a code of minimum building standards and to provide adequate inspection service to insure compliance with the Code.

From the Code sections set out, it is my opinion that the Alabama Public Library Service is empowered to receive and administer the monies received for Public Library construction and the Alabama Building Commission is empowered to plan, supervise and inspect said buildings both as to location and design. The statutes providing for the Alabama Building Commission come into play only in the event the monies appropriated or given for construction of libraries is made to the Building Commission or the Alabama Public Library Service or other appropriate State agency. That is to say, if no State agency has jurisdiction or control over the funds by appropriation or otherwise, the planning, construction and/or location of the library does not come under the control or supervision of the Building Commission.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 8, 1964

Honorable R. E. Pate
Mayor, Town of Cherokee
Cherokee, Alabama

Insurance — Municipalities.

1. An incorporated municipal board may purchase group policies of life, health, accident and hospitalization insurance for its employees, who elect to accept same, and pay the premium or any portion thereof for such insurance.
 2. An incorporated municipal board may not pay any part of the cost of insurance coverage for dependents of its employees.
- Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated March 25, 1964, is as follows:

"On September 11, 1952, under the authority of General Acts of the Legislature of the State of Alabama of 1951, Act No. 175, The Town of Cherokee formed a corporation named The Waterworks and Gas Board of the Town of Cherokee.

"The Waterworks and Gas Board of the Town of Cherokee, through its Officers and Employees operates the water and gas distribution in the Town of Cherokee, Alabama. The Board has proposed, that as employer it will become the owner of an insurance contract covering the Employees of the Waterworks and Gas Board of the Town of Cherokee, and their families under the terms of which the Employee would be entitled to \$2,000.00 life insurance benefits, health and hospital insurance for such Employees and their dependants.

"Under the proposed insurance contract, the Waterworks and Gas Board of the Town of Cherokee would be required to pay a fixed proportion of the premium for such insurance and the Employees would contribute a fixed proportion of the premium for such insurance.

"Question:

"Does the Waterworks and Gas Board of the Town of Cherokee have authority to pay insurance premiums giving benefits of life, accident and hospitalization insurance for its Employees and their dependants? Authority is granted to such Board to fix the salaries and wages of such Employees under the 1940 Code of the State of Alabama, as amended, pertaining to such corporations."

The Waterworks and Gas Board of the Town of Cherokee is an incorporated municipal board created under Act No. 175, Acts of Alabama 1951, page 416.

In an opinion reported in Quarterly Report of Attorney General, Vol. 95, page 45, this office held that Act No. 376, General Acts 1947, page 267, as amended by Act No. 34, Acts of Alabama 1959, page 439, authorizes an incorporated municipal board to purchase group life, health, accident and hospitalization insurance for the benefit of its employees and to pay a portion or all of the premium for such insurance.

Act No. 376, *supra*, was again amended by Act No. 925, Acts of Alabama 1961, page 1484. However, the 1961 amendment is not material to the problem here considered.

In an opinion rendered to Honorable Charles A. Nix, City Attorney, City of Lanett, under date of December 4, 1957 (not reported), this office held that neither Act No. 376, *supra*, nor any other State statute provides that the dependants of municipal officers and employees may be included in the group policies authorized by said Act. Cf. Quarterly Report of Attorney General Vol. 63, page 88.

Therefore, I am of the opinion that the Waterworks and Gas Board of the Town of Cherokee may purchase the insurance to which your request refers for its employees who elect to accept such insurance and pay the premium or any portion thereof for such insurance. However, I am further of the opinion that said Board may not pay any part of the cost of insurance coverage for dependants of such employees.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 16, 1964

Honorable J. Paul Meeks
Judge of Probate
Jefferson County
Courthouse
Birmingham, Alabama

Elections — Government — Municipalities.

1. The present Mayor-Council form of government of the City of Birmingham was adopted on November 6, 1962.

2. The City of Birmingham may not change its form of government within two years after the adoption of its present Mayor-Council form.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated March 9, 1964, is as follows:

"Requests have been made of me as Judge of Probate of this County to accept a petition for the change of form of government of the City of Birmingham, pursuant to the provisions of Act #452 of the Acts of the 1955 Regular Session of the Legislature.

"The present form of government, major-council plan, was adopted pursuant to an election held on November 6, 1962. Subsequent thereto elections were held in March and April, 1963, for a mayor and nine council members, and the new officials were duly installed as of April 15, 1963. The courts ruled on the issues presented at that time.

"Article IX, on page 1038 of the Acts of Alabama, 1955 Regular Session, provides necessary proceedings for the abandonment of the mayor-council form of government, and section 9.01 provides 'No city may change from the mayor-council form of government within two years after the adoption thereof. At the end of such period, or at any time thereafter, the city may change its form of municipal government, . . .'

"The Act further provides in section 9.02 on page 1038 'such change shall, however, first be initiated by petition and submitted to a vote of the qualified electors at an election and shall receive at such election a majority of the votes "yes" or in favor thereof in the same manner and subject to the same requirements as provided in Sections 1.02 and 1.05 of this Act, . . .'

"In order to determine the date on which a new petition calling for an election to change the present form of government may legally be filed under said Act #452, will you please give an advisory opinion on the following questions, to wit:

"1. What was the date of ADOPTION of the present mayor-council form of government? Was it the date the result of the election held on November 6, 1962, was certified? or, the date on which the present mayor-council officials legally assumed office and were installed?

"2. Providing that a petition bearing the requisite number of qualified voters signatures is properly filed and certified in due time, may an election be held on November 3, 1964, the date of the next general election?

"We would appreciate your opinion on the above questions as to the **expiration of two years after the adoption** of the present form of city government, so that a decision may be made as to what date would be the earliest that a new petition may be accepted and filed to call a new election."

At the election of November 6, 1962, to which your request refers, the electorate of the City of Birmingham voted to adopt the Mayor-Council form of government prescribed by Act No. 452, Acts of Alabama 1955, page 1004, as amended by Act No. 1030, Acts of Alabama 1961, page 1616. The Supreme Court of Alabama held said election valid in the case of **Reid et al v. City of Birmingham et al**, 274 Ala. 629, 150 So. 2d 735. See also **Connor v. State, Ex rel. Boutwell**, —Ala.—, 153 So. 2d 787.

As your request states, Section 9.01 of Act No. 452, as amended, *supra*, provides that no city may change from the mayor-council form of government within two years after its adoption thereof.

Article 1 of Act No. 452, as amended, *supra*, which includes Sections 1.01 through 1.08 thereof, is entitled "Adoption of Mayor-Council Form of Government — Election and Term of Council." Article 1, *supra*, provides for a petition for election, the call of the election, the form of the ballot, and in Section 1.06 thereof reads as follows:

"The election thereupon shall be conducted, the vote canvassed and the result declared in the same manner as provided by law in respect to other city elections in such city. **If the majority of the votes shall be 'yes' or in favor of such proposition, the provisions of this Act shall thereby be adopted for such city**, and the election commission or other canvassing board or official shall transmit to the governor, to the secretary of state, to the judge of probate of the county, and to the chief executive officer of the city, a certificate stating that such proposition **was adopted** by such city." (Emphasis supplied.)

Section 1.07 of said Article 1, reads in part as follows:

"Immediately upon the adoption of such form of government, the probate judge of the county with whom the petition was filed shall call an election to be held under and to be governed by this Act not less than ninety days nor more than one hundred twenty days after the date of such call, the expense thereof to be paid by such

city, for the election at large of nine councilmen and a Mayor by the qualified voters of such city. . . .”

The above-quoted portions of Act No. 452, as amended, *supra*, clearly indicate a legislative intent that, when an election is conducted to adopt the mayor-council form of government under the provisions of said Act and the results of the election are favorable to the adoption of such form of government, the date of such election is the date of the change in the form of the municipal government.

Therefore, in answer to your first question, I am of the opinion that the date of the adoption of the present Mayor-Council form of government in the City of Birmingham was November 6, 1962. In answer to your second question, I am of the opinion that an election to change the form of municipal government in said City may not be held on November 3, 1964, since said date is within two years after November 6, 1962.

This opinion is strengthened by the fact that Section 9.03 of Act No. 452, as amended, *supra*, reads as follows:

“No election on change more often than two years.—No election on the abandonment of the mayor-council form of government shall be held within two years after any other election thereon.”

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 17, 1964

Honorable T. C. Almon
Judge of Probate, Morgan County
Decatur, Alabama

Officers and Offices — Schools — Teachers — License Inspectors

A public school teacher is merely an employee of the county or city board of education, as the case may be, and does not hold an office of profit within the meaning of Section 280, Constitution of Alabama of 1901. Such teacher may also hold the office of license inspector for a county so long as the duties of one do not interfere with the duties of the other.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of April 10, 1964 is as follows:

"Will you please advise me on the following question.

"A School Teacher in the city schools here in Decatur who is paid part of his salary from state money, is License Inspector for this county, and makes between \$4000.00 and \$5000.00 as License Inspector.

"Being a Teacher, and drawing a check, part of which is state money, would it prevent him from holding the job of License Inspector for Morgan County.

"In other words would he be holding two jobs of profit at the same time.

"Please give me the benefit of your opinion on this question."

I am of the opinion that your inquiry should be answered in the negative.

This office has held that a license inspector holds an office of profit within the meaning of Section 280 of the Constitution of Alabama of 1901, which prohibits a person from holding two offices of profit at one and the same time (with certain exceptions not here material).—Biennial Report of Attorney General 1934-36, page 41.

It has also been held by this office that a public school teacher is merely an employee of the county or city board of education, as the case may be, and does not hold an office of profit within the meaning of Section 280, *supra*. Such a teacher may, while so employed and being paid for such employment, also legally hold an office of profit within the meaning of said constitutional provision.—Quarterly Report of Attorney General, Volume 62, page 64; Quarterly Report of Attorney General, Volume 54, page 176; Letter to Honorable Allen Thornton, Superintendent, Lanuderdale County Board of Education, dated January 15, 1962.

In view of the foregoing, it follows that a public school teacher is merely an employee of the county or city board of education, as the case may be, and does not hold an office of profit within the meaning of Section 280, Constitution of Alabama of 1901. Such teacher may also

hold the office of license inspector for a county so long as the duties of one do not interfere with the duties of the other.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 17, 1964

Mrs. Kenneth B. Roy, President
Auburn City Council
Auburn, Alabama

Municipal Corporation — Ad Valorem Taxes

The City of Auburn assesses and collects municipal taxes under the provision of Act 208, Local Acts Regular Session, 1935, as amended by Act 491, Regular Session 1951; Sections 35 and 36, Act 208, amended by Act 491, control the compensation to be paid to the Tax Assessor and Tax Collector of Lee County for assessing and collecting City of Auburn taxes.

Opinion by Assistant Attorney General Burson.

Dear Mrs. Roy:

Your request for an official opinion bearing date of March 13, 1964 is as follows:

"The undersigned President of the City Council of the City of Auburn respectfully requests your opinion on the question of the compensation due to be paid annually to the Lee County Tax Collector and Lee County Tax Assessor for services rendered by them to the City of Auburn in the collection of ad valorem taxes and the assessment of property for such taxes.

"The ad valorem taxes in question are school taxes: five mills levied by the City under the authority of Amendment VIII of the Constitution of 1901 and referenda held as therein provided, approving the levy; and five mills under the authority of Amendment CXLVIII of the Constitution of 1901 and a referendum held as therein provided, approving the levy.

"There are a number of local acts of the Legislature which have a bearing on the question I would like answered, and there are, of course, certain general acts on the subject of the compensation of the county tax collectors and assessors who perform services for the

municipalities within their respective counties. The City's attorneys think the following statutes may be germane:

"A. General laws

- (1) **Code of Alabama (1940)**, Title 51, Sections 30, 191, as amended
- (2) **Code of Alabama (1940)**, Title 37, Section 732, as amended

"B. Local laws

- (1) Act of July 17, 1935, 'An Act to provide for and regulate the assessment, levy, and collection of municipal taxes for the City of Auburn in Lee County. . . ' etc., and in particular, Section 36 of this Act
- (2) Act of August 22, 1951, which amends Section 36 of the Act of July 17, 1935, **Acts of 1950-1951**, Volume 1, page 872, (Act Number 491)
- (3) Act of September 19, 1949, **Acts of 1949**, page 966 (Act Number 625)

"In the light of the foregoing laws, my inquiry really has two parts: (1) Which of the foregoing statutes controls the compensation of the Lee County Tax Collector and Tax Assessor for the collection and assessment of ad valorem taxes for the City of Auburn? and (2) Precisely what percentage of the two school taxes above referred to is due to be paid the Lee County Tax Collector and Lee County Tax Assessor?"

The answers to your inquiry, and the two parts thereof, are as follows:

1. The compensation of the Lee County Tax Collector and Tax Assessor for the collection and assessment of ad valorem taxes for the city of Auburn is controlled by Act 208, Local Acts of the Legislature, Regular Session 1935 and by Act 491, Regular Session 1951 which amends Section 36 of Act 208, *supra*.

2. The percentage of the two school taxes levied under Amendments VIII and CXLVIII, Constitution of Alabama, 1901, that is to be paid to the Lee County Tax Collector is one percent (1%) of the amount of taxes collected and the percentage that is to be paid the Lee County Tax Assessor is one percent (1%) of the taxes collected.

In your inquiry you refer to several code sections and acts. Section 30, Title 51, Code of Alabama, 1940, Recompiled 1958, to which you refer, is concerned with commissions of county tax assessors. Section 30 provides, in part, as follows:

“... He shall also be entitled to receive two percent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the state or county, to be paid out of such special taxes. The tax assessor shall receive two percent commission on all special county or district taxes levied for school purposes; but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes. . .”

Section 30, *supra*, is a general statute referring to the collection of state and county ad valorem taxes. The above-quoted provision refers to collection of special county and school district taxes. It does not control the compensation to be paid for the assessment and collection of City of Auburn taxes. The Legislature of Alabama has specifically provided for such compensation in Acts 208 and 491, *supra*.

Section 191, Title 51, Code of Alabama 1940, Recompiled 1958, refers to commissions to be paid to the county tax collector. Like Section 30, *supra*, it is not controlling in the instance of City of Auburn taxes, but the special legislative provision of Acts 208 and 491, *supra*, control. See Quarterly Reports of the Attorney General, Vol. 17, p. 105 and Vol. 36, p. 84, for further discussion of the provisions of Sections 30 and 191, *supra*. The gist of the latter opinion is as follows:

“So-called special taxes authorized by local act to be levied by counties from the five mills permitted to be levied under the Constitution, 1901, Section 215, are legislative appropriations from the counties' general fund and not special taxes within Code 1940, Tit. 51, Sections 30 and 191 on which tax assessors' and collectors' commissions are calculated at the rate of two per cent.”

It will be noted that the taxes referred to in the opinion preceding were allocations of taxes within the authorized limits of Section 215, Constitution of Alabama, 1901, by legislative act and, as such, are construed as mere legislative appropriations from the counties' general funds. In the instant case, however, the taxes levied by the City of Auburn are authorized by Amendments VIII and CXLVIII to the Constitution of Alabama, 1901. The amendments increased the permissible levy for the City of Auburn as set forth in Section 216, Constitution of Alabama, 1901, and therefore, the two taxes would appear to be special taxes within the provisions of Sections 30 and 91, *supra*. Notwithstanding the fact that they are special taxes, however, the provisions of Sections 30 and 91, *supra*, relating to the commissions of tax assessors and collectors, respectively, would not apply because, as was stated previously and re-

iterated here, the Sections refer to county and school district levies, not to municipal levies, and further provisions are made specifically by the Legislature in Acts 208, Regular Session, Local Acts 1935 and Act 491, Regular Session 1951.

Also in your inquiry you refer to Section 732, as amended, Title 37, Code of Alabama, 1940, Recompiled 1958, and to Act 625, Regular Session, 1949, p. 966. Section 732 is part of a Code Article captioned "Optional Method of Collecting Municipal Taxes." Art. 2, Title 37, Sections 698, et seq., Code of Alabama 1940, Recompiled 1958; and Act 625, supra, likewise, has application to the same optional method of tax collection. Section 732, supra, can have no control over the instant case because Auburn is not operating under the provisions of Art. 2, Title 37, supra, but under the provisions of Act 208, Local Acts, Regular Session 1935, as amended by Act 491, Regular Session 1951. Section 732 applies only to municipalities who have adopted the "Optional Method of Collecting Municipal Taxes." Act 625, supra, likewise, has no control over the City of Auburn's compensations to the tax assessor and collector of Lee County for the same reason. The Act provides that those municipalities in Lee County who avail themselves to the Optional Method of Collecting Municipal Taxes, Art. 2, Title 37, supra, shall pay the tax collector and assessor in accordance with the provisions of Act 625. Auburn is not operating under the provisions of this general provision, however, but under its own separate legislative directives, Acts 208 and 491, supra.

As to the percentage to be paid to the Lee County Tax Assessor and Lee County Tax Collector, an examination of Act 208 and Act 491, supra, does not leave this question in doubt. Section 35, Act 208, supra, provides as follows:

"The Tax Assessor of Lee County shall be entitled to receive out of the first moneys collected for the City of Auburn an amount equivalent to one percentum of all taxes collected for the City of Auburn each year as full compensation for all the duties to be performed by him hereunder."

As this section has not been amended by subsequent act, as far as is discernible, the Tax Assessor of Lee County will be paid (1%) one percent of the funds collected in accordance with the provisions of Section 35, Act 208, supra.

Section 36, Act 208, supra, provided at its enactment for a commission to the Tax Collector of Lee County of one-half of one percent ($\frac{1}{2}$ of 1%) of the funds collected for the City of Auburn. This Act was amended by Act 491, supra. Section 36, Act 208, as amended by Act 491, provides as follows:

"The Tax Collector of Lee County shall be entitled to receive out of

the first moneys collected for the City of Auburn a sum equivalent to one percentum of all taxes collected for the City of Auburn each year as his full compensation for all services to be performed by him with reference to City of Auburn taxes."

Thus, the Tax Collector of Lee County, shall in accordance with Act 491, receive (1%) one percent of the funds collected for the City of Auburn each year.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 21, 1964

Dr. Julian H. Jones, President
Board of Dental Examiners of Alabama
725 Adams Avenue
Montgomery, Alabama

Sales Tax — Dentists.

1. The gross receipts of dental laboratories from the transfer of dentures to dentists are not subject to the sales tax, such transaction being primarily the rendition of services and not primarily the sale of tangible personal property.

2. A rule or regulation of the Department of Revenue, defining the transfer of dental prosthesis from dental laboratory to dentist as a sale subject to the sales tax contrary to rule or regulation and administrative interpretation of the Revenue Department of many years' standing defining said transfer primarily as a service and not taxable, is invalid.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of February 5, 1964, is as follows:

"The Board of Dental Examiners of Alabama request your opinion as follows:

"On November 5, 1959, Mr. Harry H. Haden, Commissioner of Revenue, adopted Regulation P18-131 levying the sales tax on Den-

tists in the exercise of their professional skill. This Regulation (P18-131) was declared invalid by the Alabama Supreme Court in **Haden vs. McCarty**, 152 So. 2d 141.

"Following this holding by the Alabama Supreme Court, Mr. Phillip Ham, Commissioner of Revenue, on November 5, 1963, amended Regulation P18-133 to provide that Dental Laboratories sell to Dentists at retail subject to the Sales Tax. Over a period of some twenty-two years prior to the November 5, 1963 amendment, the said Regulation provided that Dental Laboratories sold to Dentists at wholesale, not subject to the Sales Tax and that all sales from Dental Supply Houses to Dental Laboratories were at retail, subject to the Sales Tax (P18-132).

"Members of the Dental Profession are gravely concerned over the aforesaid Regulation which attempts to tax their transactions with the Dental Laboratory Technicians in view of the fact that these transactions have been exempt from the Sales Tax Act over the past twenty-two year period and since the adoption of the Sales Tax Act. It is their further opinion that the Commissioner of Revenue does not understand the relationship of the Dentists and the Dental Laboratory Technician.

"Some dentists actually fabricate every dental prosthesis applied to the patient in the treatment of disease. Other Dentists, particularly in the metropolitan areas, employ Dental Technicians within their own offices to fabricate the dental prosthesis. In other instances, groups of Dentists employ Dental Technicians to perform these services. Under all of these circumstances, the services rendered by the Laboratory Technician are under the direction and supervision of the Dentists. The Dentist purchases nothing from the Laboratory Technician except technical services. The Laboratory Technician manufactures nothing but rather follows the prescription and directions of the Dentists. The service rendered by the Laboratory Technician is not subject to the Sales Tax any more than the service provided the Dentist by a Dental Assistant or Dental Hygienist.

"It should also be emphasized that the Dental Laboratory Technician pay Sales Tax on all purchases from the Dental Supply Houses whether consumed or not in rendering their technical services and that all sales from the Dental Supply Houses directly to the Dentists are at retail subject to the tax.

"We are advised by Goodwyn & Smith, Attorneys of Montgomery, that the previous administrative interpretation by the Department of Revenue over the twenty-two year period before the promulgation of this new Regulation, in view of the fact that the Legislature has on numerous occasions amended and re-enacted the Sales Tax Act

(Act No. 100, General Acts of 1959), represents Legislative approval of the previous Regulations and renders the new Regulation invalid.

"Your consideration of this matter at the earliest possible date will be sincerely appreciated."

In my opinion, Regulation P18-133, adopted March 9, 1961, amended September 9, 1963 and November 5, 1963 by the Alabama Department of Revenue, is invalid, and consequently of no force and effect. This for the reason that over the period March 1, 1939 to September 9, 1963, Regulation R28-012, promulgated by the Alabama Department of Revenue, expressly stated dental laboratories primarily render services and incidentally use tangible personal property in connection therewith, and gross receipts of dental laboratories derived from these sources are not within the Sales Tax Act.

Thus, it clearly appears that over a twenty-four year period, the Department of Revenue not only failed to collect the sales tax in question, but by its own regulation expressly exempted the transaction between the dentists and dental laboratories. (R28-012, adopted March 1, 1939.)

I am compelled to take cognizance of the fact that the Legislature of Alabama met numerous times over the period March 1, 1939 to September 9, 1963, and the Sales Tax Act has been subjected to re-enactment and equally numerous amendments.

Over this long period of time the uniform construction by the Revenue Department must be treated as legislative approval of the departmental interpretation exempting dental laboratories from the operation of the Sales Tax Act.

In **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46, the Supreme Court of Alabama stated:

"The re-enactment, without change, of a statute which has been given a uniform construction by the administrative department 'may be treated as a legislative approval of the departmental construction of the statute, quite as persuasive as the re-enactment of a statute, which has been judicially construed.' "

To the same effect in **State v. Birmingham Rail & Locomotive Co.**, 259 Ala. 443, 66 So. 2d 884, the administrative construction of a tax law had been in effect from 1937 to 1949, and the Supreme Court of Alabama said:

"It is an established rule of statutory construction that when a tax statute has been construed by the highest officials charged with the duty of administering the tax laws, such construction should be given

favorable consideration by the courts, especially if such construction has stood unchallenged for a considerable time. *State ex rel. Fowler vs. Stone*, 237 Ala. 78, 185 So. 404; *State vs. Tuscaloosa Building and Loan Ass'n.*, 230 Ala. 476, 161 So. 530; 99 A.L.R. 1019. And the weight to be given an administrative interpretation is increased when the legislature, in re-enacting the law, fails to indicate in any way its disapproval of the settled administrative construction."

In *State v. Southern Electric Generating Company*, 274 Ala. 668, 151 So. 2d 216, the Alabama Department of Revenue had construed Title 51, Section 178, Code of Alabama 1940, relating to taxation of sales of electric energy, in such a manner as to exclude from its operation electricity sold outside the State. This ruling by the Department having been made in 1935, remained in effect and unquestioned until 1960, at which time the Department, by regulation, attempted to tax electric current sold by the Alabama Power Company to the Georgia Power Company. The Supreme Court of Alabama refused to allow the Revenue Department to deviate from its long established construction and held that the Department was bound by its previous administrative construction of twenty-five years.

It logically follows that the Alabama Revenue Department is bound by its administrative interpretation exempting transactions between dental laboratories and dentists from the Sales Tax Act under Regulation R-28-012 over the twenty-four year period in question. Accordingly, it is my opinion that Regulation P-18-133, as last amended November 5, 1963, is invalid and of no force and effect.

This conclusion is made even more persuasive when considered in view of the recent decision in *Haden v. McCarty*, 152 So. 2d 141 (1963), and the provisions of Title 46, Section 120(25), Code of Alabama, Recompiled 1958.

In my opinion when a dental laboratory technician fashions raw materials into a usable dental prosthesis, he is performing nothing more than a service for the dentist, which service must be rendered under the direction and supervision of the dentist to the same extent in application as those services rendered by the dental technician within the office of the dentist.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 21, 1964

Hon. Albert J. Lingo
Director
Dept. of Public Safety
Montgomery, Alabama

State Board of Adjustment — Appropriations — State Dept.
of Public Safety — State Departments and Agencies.

1. The State Comptroller may pay Board of Adjustment awards out of any monies appropriated to the Dept. of Public Safety by the Legislature.
2. Salary money, if presently available and will not be used for salary purposes during the fiscal year, may be applied to the payment of awards decreed by the Board of Adjustment.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of April 8, 1964 is as follows:

“This Department has been notified by Mr. John Graves, State Comptroller, that the Board of Adjustment has made the following awards to be paid out of the funds of the Department of Public Safety:

Gordon Phillips	\$1,000.00
Mrs. Paul H. Jones	3,000.00
Gordon Phillips	7,750.00
Mrs. Stephanie D. Maxwell	7,500.00
Mrs. Geraldine Haponski	100.00
C. F. Beard	4,000.00
Bessie Gray Owens	6,000.00

“We note that Title 55, Section 343, Code of Alabama, provides that Adjustment Board Awards are to be paid by the Board out of monies appropriated annually out of the General Fund of the State of Alabama for the purpose of payment of awards that may be necessary.

“We have available, at this time, an amount in salary money to cover the total amount of the awards. The salary money will not be used this fiscal year.

“Our question is whether or not this Department can pay these awards out of any monies appropriated to this Department that are

available at this time, and the above-mentioned salary money is available at this time."

Your request for an opinion is answered in the affirmative.

Title 55, Section 340, Code of Alabama 1940, as Recompiled 1958, provides, in pertinent part, as follows:

"The Board of Adjustment in its findings of facts and its findings and decrees as to the amount of payment * * * may adjudge and find that said damage shall be paid out of the appropriations made to the agency, commission, board, institution or department of the State of Alabama whose employees, servants, agents or instrumentalities inflicted the damages and injuries complained of. * * * "

Title 55, Section 341, Code of Alabama 1940, as Recompiled 1958 provides, in pertinent part, as follows:

"The secretary of the board of adjustment * * * shall deliver to the comptroller of the state of Alabama a certified copy of its findings and decrees, * * * and he shall charge the same to the appropriation as directed in said findings or decrees."

Title 55, Section 342, Code of Alabama 1940, as Recompiled 1958, provides as follows:

"The treasurer of the state of Alabama is authorized and directed to pay the warrants of the comptroller, drawn pursuant to the findings and decrees of the board of adjustment, out of any money in the treasury of the state of Alabama as directed by such findings and decrees."

Title 55, Section 343, Code of Alabama 1940, as Recompiled 1958, as amended by Act No. 307, Acts of Alabama 1963, page 786, provides, in pertinent part, as follows:

"There shall be appropriated annually out of the general fund of the state of Alabama, * * * a sufficient amount, not exceeding \$200,000.00 for any year, as may be necessary to pay the claims ordered paid by the board of adjustment, and its expenses."

Title 55, Section 344, Code of Alabama 1940, as Recompiled 1958, provides as follows:

"The purpose of this article is to provide a method of payment by the state of Alabama or any of its agencies, commissions, boards, institutions or departments to persons for injuries to person or property

or for death occasioned by the state of Alabama, or any of its agencies, commissions, boards, institutions or departments, where in law, justice or good morals the same should be paid."

It appears to me that the legislative intent as expressed by the above cited Code sections, is to allow the Board of Adjustment the prerogative of requiring the department or agency to pay an award out of its appropriation.

Examine carefully the language of Sections 341 and 342, supra, wherein it provides that there shall be "appropriated out of the general fund * * * a sufficient amount * * * to pay the claims ordered paid by the Board of Adjustment,* * *"; and directing the comptroller to "charge the same to the appropriation as directed in said findings or decrees."

The awards made by the Board of Adjustment to the following named persons were directed to be paid from the monies appropriated to the Department of Public Safety out of the General Fund of the State:

Gordon Phillips	\$1,000.00
Mrs. Paul H. Jones	3,000.00
Gordon Phillips	7,750.00
Mrs. Stephanie D. Maxwell	7,500.00
Mrs. Geraldine Haponski	100.00
C. F. Beard	4,000.00
Bessie Gray Owens	6,000.00

In an opinion of this office under date of February 29, 1940 found in Quarterly Report of Attorney General, Volume 18, page 286, it was said that although Section 341, supra, referred to the comptroller, it was the obvious intent of the Legislature to have the officer of the department or agency charged with making the disbursement to receive the decree and make the award.

In view of the above-cited Code sections, dealing with the specific subject of paying the awards of the Board of Adjustment, it is my opinion that the Department of Public Safety may pay the awards out of the monies appropriated to it by the Legislature from the General Fund. See also the above cited opinion of this office. This conclusion means that you may pay the above awards out of the salary money that you presently have available and which will not be used to pay salaries this fiscal year.

Any opinions of this office heretofore rendered that conflict with this opinion are hereby overruled, and the opinion rendered to Hon.

Ralph Smith, as Associate Commissioner, Alabama Public Service Commission, under date of June 20, 1960 is modified to conform to this opinion.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 22, 1964

Honorable Murray W. Beasley
Attorney, State Licensing Board
for General Contractors
Box 247
Tuscumbia, Alabama

Contracts — Contractors — Licenses — Bids

Even though the invitation for bids is based on different phases of one over-all project and the separate bids on each of such phases are under \$20,000, yet if one contractor is awarded contracts totaling \$20,000 or over on several phases of said project, such contractor is a "general contractor" within the purview of Title 46, Section 65, Code of Alabama 1940, Recompiled 1958, 1961 Cumulative Pocket Part.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of April 8, 1964 is as follows:

"As attorney for the State Licensing Board for General Contractors, I have been asked to write you for an official opinion concerning some matters that have been brought to the Board's attention concerning certain construction work throughout the state.

"Some contractors, both out of state and some of our contractors within the state who are not licensed by the State Licensing Board for General Contractors, have been bidding on projects and actually starting construction on same under what they call three separate contracts. For example, there is a bank now being constructed in Loxley, Alabama, and the contractor is a Pennsylvania corporation but is not licensed by the State Licensing Board for General Contractors in Alabama, and upon being confronted with operating without a license, they state that the Loxley bank project was bid

in by them under three separate bids, one for foundation and walls, one for interior completion, and the other for the paving outside, all three of them being under \$20,000.00 each, but, of course, over all, it would exceed \$20,000.00 which is the limit under our law.

"Our question is whether or not one contractor can bid in on one job under different phases of that job under \$20,000.00 for each phase and thereby avoid being classified as a general contractor, or is the construction work to be considered on an over all basis?"

Although each situation would be governed by the particular facts thereof, I am of the opinion that, generally speaking, one contractor, who bids in on one job under different phases of that job of under \$20,000 for each phase, cannot avoid being classified as a "general contractor" if the total award to him amounts to \$20,000 or more.

Title 46, Section 65, Code of Alabama 1940, Recomplied 1958, 1961 Cumulative Pocket Part, provides as follows:

"65. Definitions. — For the purpose of this chapter a 'general contractor' is defined to be one who, for a fixed price, commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structures where the cost of the undertaking is twenty thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, in the state of Alabama, costing twenty thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the state of Alabama. (1935, p. 721; 1959, p. 1429, appvd. Nov. 19, 1959.)"

Even though the invitation for bids is based on different phases of one over-all project and the separate bids on each of such phases are under \$20,000, yet if one contractor is awarded contracts totaling \$20,000 or over on several phases of said project, I am of the opinion he would be a "general contractor" within the purview of Section 65, *supra*. The total cost of the phases of the over-all project as awarded to one contractor in such instance would amount to \$20,000 or more.

To hold contrary to the above might allow the practicing of a subterfuge to avoid the classification of such a contractor as a "general contractor." In other words, one project could be separated into several phrases of work, each under \$20,000, and if the total award to one contractor amounts to \$20,000 or more, he would not have to qualify as a "general contractor." Such a contractor, in fact, would be performing work in the amount of \$20,000 or more on one project even though it may have been divided into phases of less than \$20,000 for each phase.

The example set out in your letter, in my judgment, presents a case wherein the contractor comes within the definition of a "general contractor."

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

April 23, 1964

Honorable John R. Hargis, Superintendent
Autauga County Board of Education
Prattville, Alabama

Schools — Elections — Taxation

Special school tax election provided for by Amendment CCII (202) to the Constitution of Alabama 1901 shall be called, held, conducted, paid for, and governed otherwise in the manner provided for an election on the school district tax authorized by Amendment III to the Constitution and Title 52, Sections 254-261, Code of Alabama 1940; and this does not require a petition of the qualified electors of the county, but merely a request of the county board of education, no city board of education being involved, to the county governing body to call said election in compliance with said request.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of April 6, 1964 is as follows:

"We will appreciate very much your opinion on the following matter.

"During the 1961 Special Session of the State Legislature a Constitutional Amendment was proposed (Act No. 23) and later ratified by the voters of the State making it possible for the Board of Revenue of any county to levy and collect a Special County Tax not to exceed 5-Mills to be used for educational purposes. Our question is what is necessary for this Board to do in requesting the Board of Revenue to call a special election for the purpose of levying this new tax. Does it take the signature of 200 or more freeholders or can it be done by a resolution of this Board to the Board of Revenue?"

In answer to your inquiry, it is my opinion that a special school tax election provided for by Amendment CCII (202) to the Constitution of Alabama 1901 shall be called, held, conducted, paid for, and governed otherwise in the manner provided for an election on the school district tax authorized by Amendment III to the Constitution and Title 52,

Sections 254-261, Code of Alabama 1940; and this does not require a petition of the qualified electors of the county, but merely a request of the county board of education to the county governing body to call said election in compliance with said request. There is no city board of education involved in the instant situation.

The constitutional amendment to which you refer was proclaimed ratified May 10, 1962, and designated as Amendment CCII (202). Said amendment provides as follows:

“The court of county commissioners, board of revenue, or other like governing body of each of the several counties in the state shall have the power to levy and collect a special county tax of not to exceed fifty cents on each one hundred dollars of taxable property, in addition to all other taxes now or hereafter authorized by the Constitution and laws of Alabama, for educational purposes, on the value of the taxable property in the county as assessed for state taxation, provided the purpose thereof, and the time such tax is proposed to be continued shall have been first submitted to a vote of the qualified electors of the county and voted for by a majority of these voting at such election. If any proposal to levy the tax is defeated in any election, subsequent elections thereon may be held at any time. The election provided for herein shall be called, held, conducted, paid for, and governed otherwise in the manner provided for **an election on the school district tax** authorized in Constitutional Amendment III.” [Emphasis Supplied]

While Amendment III to the Constitution, *supra*, authorized the levy, the machinery for putting it into effect is provided for by the Legislature under Title 52, Chapter 10, Article 7 (Sections 254-261), Code of Alabama 1940. — **Opinion of the Justices**, 269 Ala. 127, 111 So.2d 605; **Runyan v. Thompson**, 232 Ala. 390, 168 So. 423. Title 52, Section 254, *supra*, provides as follows:

“§ 254. **Calling election for levy of tax.** — Upon a petition signed by two hundred or more qualified electors of any county to the court of county commissioners or other governing body, said court of county commissioners or other governing body shall order an election to be held at the time specified in said petition to determine whether or not a special tax shall be levied for public school purposes within said county, and upon request of the county board of education to the court of county commissioners or other governing body, said court shall order an election to be held at the time requested by the said board of education to determine whether or not a special tax shall be levied for **public school purposes within any school tax district** in the county under the control of such board; and upon the request of any city board of education to the court of county commissioners or other governing body said court shall order an election to be held at the time requested by said board of education

to determine whether or not a special tax shall be levied for public school purposes within said city. (1927 School Code, § 261.)" [Emphasis supplied]

In construing the forerunner of this section, which was Section 261 of the School Code of 1927, this office held that in case of a county-wide three-mill tax election, a petition signed by qualified electors is necessary before the court of county commissioners or other governing body can call the election. It was also held that in the other two cases, which deal with school district taxes, the request of the county board or the city board of education, as the case may be, is sufficient; and that when such request is made the election is called by the court of county commissioners or other governing body in compliance with the request. — Biennial Report of Attorney General 1934-36, page 641, as amplified by Quarterly Report of Attorney General, volume 24, page 15.

Since Amendment CCII, *supra*, provides that the election provided for therein shall be called, held, conducted, paid for, and governed otherwise in the manner provided for an election on the **school district tax** authorized in Constitutional Amendment III, it follows that the procedure relative to **school district taxes** should be followed. In the instant case, this does not require a petition of qualified electors of the county, but merely a request of the county board of education to the county governing body to call the election in accordance with the above cited opinion of this office.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 23, 1964

Honorable Jack W. Torbert
City Recorder
Gadsden, Alabama

Costs & Fees — Fines — Refunds — Appeals

No refund of fine and costs paid at time of sentence where case is subsequently appealed.

Opinion by Assistant Attorney General Bridges.

Dear Mr. Torbert:

Your request for an official opinion bearing date of March 19, 1964, is as follows:

"Mr. Joe Hubbard, the Police Commissioner of the City of Gadsden, has requested that I write you and request a ruling regarding payment of fines in the City Court of Gadsden, Alabama where the following conditions occur:

"The man is tried, found guilty, and sentenced to pay a fine in City Court. At the time of his sentence the fine and costs are paid, a receipt given therefor, and the fact of payment of the fine is entered up on the docket sheet. Then within the five day appeal period, the Defendant appeals the conviction, making an appeal bond with good and sufficient sureties, appealing the conviction to the Circuit Court. Under these circumstances, should the fine and costs be repaid to the Defendant or should the fine and costs be held by the City pending a final determination in the Circuit Court?"

It is my opinion that the fine and costs paid under the circumstances delineated in your inquiry should be held by the city and treated exactly as if no appeal had been taken from the judgment imposing such fine and costs. This opinion is based on the premise that the person paying the fine and costs could not recover such fine and costs even if his appeal results in his case being reversed.

It is a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered. **Smith v. Baldwin**, 237 Ala. 423, 187 So. 192; **Bailey v. Ming**, 16 Ala. App. 269, 77 So. 419; 40 Am.Jur., Payment Sec. 157.

It also appears to be well settled that money voluntarily paid as a fine with knowledge of the facts cannot be recovered. **McDonald v. Sowell**, 129 Ga. 242, 58 S.E. 860 and other cases cited in 40 Am.Jur., Payment Sec. 220. It has been held that the payment of a fine is voluntary, and thus irrevocable, where, at the time of payment of fine imposed, the accused has an option to pay the fine or to appeal, and he chooses to do the former, even though he subsequently appeals, and the conviction upon review is set aside. See cases cited in the annotations in 26 ALR beginning on page 1523. Quarterly Reports of the Attorney General, Vol. 17, page 23; Vol. 31, page 10; Vol. 37, page 12.

Although the precedents cited above are concerned with fines only, the same rationale would apply to the voluntary payment of costs; such costs may not be recovered by the person paying them under the circumstances described by you.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 24, 1964

Honorable C. R. Lewis
City Attorney
City of Dothan
Dothan, Alabama

Municipalities — Streets — Opinions Overruled, Modified or Distinguished.

1. A municipality is authorized to establish, maintain and operate off-street parking facilities within its corporate limits.
2. Opinion reported in Quarterly Report of Attorney General, Vol. 86, page 27, overruled and withdrawn.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated April 3, 1964, is as follows:

"Your opinion is requested on the following questions:

"(1) Does the City of Dothan have the legal authority to acquire by eminent domain land within its corporate limits for the purpose of establishing, maintaining or operating off-street public parking facilities?

"(2) Does the City of Dothan have the legal authority to acquire land by purchase or gift within its corporate limits for the purpose of establishing, maintaining or operating off-street public parking facilities?

"(3) Does the City of Dothan have the legal authority to establish, maintain or operate off-street public parking facilities within its corporate limits?

"(4) Does the City of Dothan have the legal authority to incur indebtedness, or issue its general or revenue bonds or warrants for

the purpose of acquiring, establishing, maintaining or operating off-street public parking facilities within its corporate limits?"

The problem presented has not heretofore been considered by the appellate courts of this State.

In an opinion reported in Quarterly Report of Attorney General, Vol. 86, page 27, rendered on February 21, 1957, this office held that a municipality is not authorized to establish, maintain and operate an off-street parking facility. This conclusion was reached in said opinion because of the absence of an express statutory grant of such authority.

As stated in said opinion, a municipality may exercise those powers granted in express words, those necessarily or fairly implied in or incident to powers expressly granted, or those essential to the declared objectives and purposes of the corporation. **City of Bessemer, et al v. Huey**, 247 Ala. 12, 22 So. 2d 325; and **Johnson v. City of Sheffield, et al**, 236 Ala. 411, 183 So. 265.

The control of municipal streets and the flow of traffic thereon is a governmental function to be administered through the police power of the municipality. See Constitution of Alabama 1901, Section 220.

The automobile has introduced into laws relating to police powers many questions affecting the lives, health, happiness, personal and property rights, and general welfare of the public, all of which have to be considered, safeguarded and defined according to the facts of each case. **City of Decatur v. Robinson, et al**, 251 Ala. 99, 36 So. 2d 673. See also **Birmingham Interurban Taxicab Service Corporation v. McLendon, et al**, 210 Ala. 525, 98 So. 578.

The Supreme Court of Alabama in 1948, in the case of **City of Decatur v. Robinson, et al**, supra, held that a municipality is authorized to install and operate parking meters upon its streets. The court based this authority upon the police power possessed by a municipality to regulate traffic on its streets. It is interesting to note that the same court, eleven years earlier, had held that this authority was not possessed by a municipality. See **City of Birmingham v. Hood McPherson Realty Company**, 233 Ala. 352, 172 So. 114.

In the case of **Miller, et al v. City of Georgetown**, 301 Ky. 241, 191 S.W., 2d 403, the Court considered a problem similar to the one presented by your request. The opinion in said case reads in part as follows:

"It is a matter of common knowledge that the great increase in recent years of motor vehicles has created a situation, even in the smaller cities, which is fraught with danger to persons using the streets and causes inconvenience to the residents of the city. Under the power to regulate the use of vehicles on their streets, cities

may, and frequently do, prohibit parking on the streets in congested areas, and we think the right to furnish parking space is a necessary adjunct to the right to regulate traffic, otherwise it would be impossible to achieve the general objectives of the statutory grant of power to regulate the use of streets by vehicles. . . ."

Although the authorities are divided, some jurisdictions hold that municipalities may establish and operate off-street facilities where there are no statutes expressly creating such power. See cases cited in the Annotation in 8 A.L.R. 2d 373. See also the Annotation in 83 A.L.R. 2d 635.

Premises considered, I am of the opinion that the police power possessed by a municipality in this State authorizes the City of Dothan to establish, maintain and operate off-street parking facilities within its corporate limits. I am further of the opinion that said City may acquire land by purchase or gift for the purpose of establishing such parking facilities.

The opinion expressed herein answers your second and third questions. The facts discussed in our recent telephone conversations render answers to your first and fourth questions unnecessary.

The opinion reported in Quarterly Report of Attorney General, Vol. 86, page 27, is hereby expressly overruled.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 28, 1964

Mr. Ruben K. King, Commissioner
State Department of Pensions and Security
Administrative Building
64 North Union Street
Montgomery, Alabama

Pensions & Security — Desertion — Non-Support

The appropriate official to receive Reciprocal Non-Support petitions in Alabama is the Register of the Circuit Court in Equity.

Opinion by The Attorney General

Dear Mr. King:

Your request for a formal opinion is as follows:

"Under the authority of Act #879, Acts of Alabama 1951, as amended by Act #823, Acts of Alabama 1953, this Department serves as the

State information agency for Alabama's Reciprocal Support of Dependents Legislation. Some question has arisen as to the proper official to whom out-of-state petitions under this legislation should be mailed. This Department originally sent the necessary papers to the presiding judge of the circuit where the respondent lives. From time to time over the years, individual courts have requested other procedures, and no uniform method is now used. From information obtained about other states (all 49 of which have similar legislation), we note that the Clerk of the Court or the petitioner's representative seem to be the most commonly designated official to receive the petitions.

"I would appreciate it if you would give me your formal opinion as to the appropriate official to whom we should advise other states to mail petitions or to whom we should mail petitions when acting as the forwarding agency in the case initiated in another state. Our Act specifies that 'When the court of this state, acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall (1) docket the cause, (2) notify the circuit solicitor.' It further directs this Department to 'compile a list of the courts and their addresses in this state having jurisdiction under this article, and to transmit the same to the state information agency of every other state. . . .' (Title 34, Sections 116 and 123, Code of Alabama, Recompiled 1958).

"Thank you in advance for your consideration of this matter."

You have asked which official is the appropriate official to receive Reciprocal Non-Support petitions when Alabama is acting as responding state, pursuant to the Reciprocal Support of Dependents Act (Act #879, General Acts of Alabama 1951, as amended by Act #823, General Acts of Alabama 1953, codified in Title 34, Section 105 - 123, Code of Alabama, 1940, Recompiled (1958)). In Alabama the court having jurisdiction over these proceedings is the Circuit Court in Equity (See Title 34, Section 106, *supra*).

Rule 2 of Alabama Equity Rules, Title 7, Code of Alabama 1940, provides as follows:

"Suits; how commenced. A suit invoking the judicial power of the state of Alabama as to matters believed by the plaintiff to be within equity or chancery jurisdiction is commenced by filing a bill of complaint in the Circuit court of some judicial circuit, or in some other court of equity jurisdiction created by the Legislature, having selected the particular court in conformity with the statute law prescribing venue."

Equity Rule 2 for purposes of this question should be read along with the

provisions of Title 7, Section 43, Code of Alabama 1940, which describes the proper place in which a suit should be filed. This section provides:

"Commencement of suit.—The filing of the complaint, bill of complaint, or other statement of plaintiff's cause of action, in the office of the clerk or register of the circuit court, or other ministerial office of courts of like jurisdiction, shall constitute the commencement of suit."

You will notice that the office of the clerk or the register of the circuit court is described as the "ministerial office of courts." In this instance the register would be the appropriate official to receive Reciprocal Non-Support petitions since the court is the Circuit Court in Equity. When the petition is filed, it would then be the duty of the register to issue the necessary summons (*McKenzie v Baldrige*, 49 Ala. 564, 566). The cause is then to be docketed (Title 34, Section 116, *supra*) and the petitioner's representative represents the out-of-state petitioner in proceedings pursuant to this statute. The statute provides that three copies of the petition be transmitted to the court in the responding state. One copy would accompany the summons, and another copy would be transmitted by the register to the circuit solicitor or other prosecuting attorney designated by the circuit judge to represent the petitioner (Title 34, Section 113, *supra*). Section 116 of Title 34, *supra*, provides for the docketing of the cause, notification of the circuit solicitor, the setting of a time and place for hearing, and other action necessary to obtain jurisdiction.

There is nothing in Alabama's Reciprocal Non-Support law that indicates that the "court" takes on any functions or performs in any manner different from the way "courts" perform in any other equity proceeding, but each officer of the court performs his functions—ministerial, judicial, or as a solicitor as he would in any other equity proceeding .

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 28, 1964

Honorable Harold E. Walker
Commissioner, City of Brundidge
Brundidge, Alabama

Ballots — Elections — Government — Municipalities.

1. In the event a change in the form of municipal government is directed by the electorate in an election to be held on May

11, 1964, such change will become effective on October 1, 1964.

2. The form of ballot prescribed by statute must be used in an election to abandon the commission form of municipal government.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated April 10, 1964, is as follows:

"We have been petitioned by a group of people to change our form of government from commission form to aldermanic as it existed prior to the change to commission form pursuant to Section 120 of the 1940 Code of Alabama. We have scheduled an election to determine the wishes of the people for May 11, 1964.

"There are two questions that we desire a ruling from you on: (1) Pursuant to Section 133(1), when will the effective date of the change be if the people desire a change? (2) due to wording of Section 124 as to the form of ballot, it is possible that some of the people will not understand how to vote. In place of yes and no, may we put,

"For Commission Form ()

"For Mayor-Council ()."

If the result of the election to which your request refers directs a change in the form of government of the City of Brundidge, the effective date of such change will be controlled by Act No. 71, Acts of Alabama 1959, page 477.

Act No. 71, *supra*, provides that no change from the commission to the mayor-council form of government directed by vote of the electors of a municipality shall become effective until October 1 of the general municipal election year next following the election at which such change is voted.

The obvious purpose of Act No. 71, *supra*, is to keep the commissioners, who hold office at the time of the election directing the abandonment of the commission form of government, in office until the qualified electors of the municipality may elect a mayor and the requisite number of councilmen of the next general municipal election.

1964 is a general municipal election year in this State. Quarterly Report of Attorney General, Vol. 111, page 78.

Therefore, I am of the opinion that, in the event the result of the election to be held in the City of Brundidge on May 11, 1964, directs a change in the form of government of said City, such change will become effective on October 1, 1964.

It should here be pointed out that, in the event such change in the form of government of said City is directed by the electorate, the election to select a mayor and members of the city council should be held under the provisions of Act No. 663, Acts of Alabama 1961, page 827.

The election of May 11, 1964, will be conducted under the provisions of Title 37, Chapter 4, Article 3, Code of Alabama 1940. This is the only method provided by the general law by which a municipality may abandon the commission form of government.

Title 37, Section 124, Code of Alabama 1940, which is a part of Article 3, *supra*, reads in part as follows:

" . . . The following shall be the form of ballot, which words shall be printed in plain type on separate slips, namely: 'Shall the proposition to abandon the commission form of government, in the city of . . . and return to aldermanic form of government as it existed in said city at the time said commission form of government was adopted, be adopted: Yes . . . ; No . . . ' The voter shall mark his ballot with a cross mark before or after the word which expresses his choice. No other proposition shall be submitted to the voters of said city upon the ballot."

You will note that mandatory language is used in the above-quoted portion of Section 124, *supra*.

Therefore, I am of the opinion that the form of ballot prescribed by Section 124, *supra*, must be used in the election to which your request refers.

Very truly yours,
RICHMOND M. FLOWERS
Attorney General

April 29, 1964

Honorable Archie I. Grubb
City Attorney
Post Office Box 342
Eufaula, Alabama

Boards of Equalization — City Boards of Education —
Municipalities—Officers and Offices.

1. A member of a city board of education is a public officer.
2. Where a member of a city board of education is not entitled to compensation, he does not hold an office of profit.
3. A member of a city board of education is not an employee of such board.
4. Where a member of the city board of education is not entitled to compensation, he may, at one and the same time serve as a member of the county board of equalization.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated March 27, 1964, reads as follows:

"At the request of Honorable Marvin E. Edwards, Mayor of Eufaula, I am writing to obtain your opinion on the following question:

"Does Title 51, Section 92, Code of Alabama 1940, prevent a member of the Barbour County Board of Equalization from at the same time serving as a member of the Eufaula City Board of Education?

"The members of the Board of Education are appointed by the City Council and receive no compensation whatever."

Title 51, Section 92, Code of Alabama 1940, reads as follows:

"No member of any county board of equalization shall hold employment or office of profit with the United States, the state of Alabama, any county or other political subdivision of said state, or with any board, department or other agency of the United States, of the state of Alabama, of any county or other political subdivision of said state or with any county school board or with any municipality, while holding office as a member of said board."

By virtue of Title 52, Section 151, Code of Alabama 1940, as amended by Act No. 1022, Acts of Alabama 1961, page 1601, a member of the City Board of Education of the City of Eufaula must serve as such member without compensation.

A member of a city board of education is a public officer. See **Jefferson County v. O'Gara, et al**, 29 Ala. App. 281, 195 So. 267; **State v. Homan**, 38 Ala. App. 642, 92 So. 2d 51; and Quarterly Report of At-

torney General, Vol. 23, page 173. However, where such member is not entitled to compensation for his services, he does not hold an office of profit. Quarterly Reports of Attorney General, Vol. 7, page 143; Vol. 32, page 154; and Vol. 103, page 8. Such a public officer is not an employee of the board of education.

Premises considered, I am of the opinion that a member of the Barbour County Board of Equalization may, at one and the same time, serve as a member of the City Board of Education of the City of Eufaula. Quarterly Report of Attorney General, Vol. 15, page 148.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 30, 1964

Hon. Walter S. Houseal
Superintendent of Insurance
Administrative Building
C A P I T O L

Insurance — Rebates — Dividends.

Rebates and dividends on group life and/or group health and accident insurance discussed generally.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion, bearing date of March 16, 1964, as amended by request dated April 6, 1964, is as follows:

"I would appreciate your opinion on the following:

"Is it in violation of the insurance laws of Alabama for an insurer writing Group Life and/or Group Accident and Health Insurance to perform any of the following:

"1. Give a free policy (premium paid) to anyone in the Group for any services performed or otherwise.

"2. Pay a collection fee to anyone in the Group for any services performed or otherwise.

"3. Return a portion of the paid premiums to a person rather than to each individual insured.

"If your answer is in the affirmative to Question 2, should the person receiving this collection fee be licensed as an insurance agent?

"I hereby respectfully submit the following as an amendment to Questions 1 and 2 to my request for an opinion under date of March 16, 1964, regarding insurers writing Group Life and/or Group Accident and Health Insurance:

"1. (A) Give a free policy (premium paid) to the bookkeeper, payroll clerk, or anyone employed in the office of a city, county, state, or private school system for collecting the premiums (including the payroll deduction plan) from the members of the group insurance coverage and remitting this premium money to the insurer.

"(B) Give a free policy (premium paid) to the city or county superintendent of education, principal, teacher, or president of a school system for permitting the collection of this premium money.

"2. In lieu of a free policy (premium paid) pay a collection fee the amount being based on the amount of premiums collected to any of the persons outlined in Question 1(A) and (B), supra, or to any function of the school system such as athletic fund, school cafeteria, general fund, etc."

Since the questions submitted possibly involve rebates, insurance laws pertaining to such rebates are set out.

"In insurance rebates are deductions from stipulated premiums allowed in pursuance of antecedent contract" Vol. 36, Words and Phrases, page 669.

This definition was quoted in **Julian Ins. Com'r v. Guarantee Life Ins. Co.**, 159 Ala. 533, 49 So. 234; Alabama Digest, Vol. 12, Insurance Key No. 184.

The giving of rebates is mentioned in Title 28, Sections 17, 30, 75 and 90(4)(8), Code of Alabama 1940, as amended. They are as follows:

"§ 17. REBATES, SPECIAL PRIVILEGES ALLOWED CERTAIN POLICY HOLDERS: PENALTY FOR.—Any company or agent who shall directly or indirectly make a contract of insurance or agree-

ment as to policy contracts other than that expressed in the policy issued thereon or who shall pay, allow or offer so to do, any rebate or premium or any advantage to any particular policy holder over others of the same class, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars for the first offense and shall be fined not less than two hundred and fifty dollars for each subsequent offense, provided that the provision of this section shall not include or relate to a note or notes given for a second or any subsequent premium."

"§ 30. UNLAWFUL TO MAKE CONTRACT OTHER THAN AGREED IN POLICY; OR TO GIVE REBATES, ETC.—No life insurance company or agent thereof shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, collector, or representative thereof, pay, allow or give or offer to pay, allow or give, directly or indirectly, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell or purchase or offer to give, sell or purchase, as inducement to insurance or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value whatever, not specified in the policy.

"§ 75. POLICY CONTRACT TO EXPRESS ENTIRE CONTRACT; EXCEPTION; REBATES ON PREMIUMS PROHIBITED. — No life nor any other insurance company nor any agent thereof shall make any contract of insurance or agreement as to policy contract other than is plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow or offer to pay or allow for inducement to insurance any rebate of premiums payable on the policy nor shall any particular policyholder of the same class be allowed any advantage in the dividends or other benefits to accrue thereon or any value, consideration or inducement whatever not expressed in the policy contract of insurance; provided that the parties to any policy of life insurance now or hereafter issued shall have the right at any time to mutually agree in writing for an extension of time in which to pay a second or subsequent premium on said policy upon condition that the failure to pay said amount agreed upon at the time agreed shall lapse the policy as of the date mutually agreed upon in said writing; provided further that no such agreement shall impair any right to extended or paid up insurance which the insured may have under said policy nor any right to have the premiums, any part thereof, or the amount payable for such extension

charged against the policy under the terms of the policy. No such agreement need be attached to or made a part of the insurance policy so affected."

"§ 90 (4). UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED.— . . .

"(8) Rebates. — (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance or agreement as to such contract other than as plainly expressed in the contract issued thereon; or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to any contract of insurance, any rebate of premiums payable on the contract.

"(b) Nothing in subsection (7) or paragraph (a) of subsection (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices; (A) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from non-participating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (B) in the case of life or health and accident insurance policies issued on the industrial debit or weekly premium plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (C) re-adjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy years; (D) in the case of life insurance companies, allowing its bona fide employees to receive a commission or reduction on the premiums paid by them on policies on their own lives; (E) issuing life or accident and health policies on a salary savings, bank draft, pre-authorized check or payroll deduction plan or other similar plan at a reduced rate reasonably related to the savings made by the use of such plan; (F) paying commissions or other compensation to duly licensed agents or brokers, or allowing or returning to participating policyholders, members or subscribers, dividends, savings or unabsorbed premium deposits."

Under the above-quoted Code Sections the so-called giving of a free policy (actually the assumption of payments by the company) is a rebate and violative of the insurance laws of Alabama as such. My answer to question 1(A) and 1(B), as amended, is in the affirmative.

Such assumption of payment of premiums by an insurer is clearly an unfair method of competition as set out in Title 28, Section 90(4)(8a), Code of Alabama 1940, as amended.

My answer to your amended question No. 2 is that the person outlined in question 1(A) could be paid a collection fee only if that person is a duly authorized agent. See Section 90(4) (8b-f), supra. The giving of a collection fee to any person set out in question 1(B) for permitting the collection of premium money is a rebate under Section 90(4)(8a), supra, as knowingly making an agreement to such contract of insurance other than is plainly expressed in the contract and violative of the insurance laws of Alabama. The payment of such a collection fee to any school function such as you have set out in amended question No. 2, is also violative of the insurance laws of Alabama for the same reason.

The third example is violative of the insurance laws of Alabama as a rebate. Should the portion of the paid premiums be returned to each individual insured, it would fall under the exception to the rebate rule.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 5, 1964

Honorable M. L. Murphy, Sheriff
Russell County
Phenix City, Alabama

Sheriffs — Costs and Fees — County Courts — Sentences —
Russel County

1. Sheriffs fees may be paid from County Court Fund in cases not pressed in the County Court of Russell County.
2. Sheriffs fees may not be paid by county where sentence is suspended by County Court of Russell County.
3. Sheriffs fee for summoning witnesses before the Grand Jury when no indictment is returned is \$.50 for serving each witness.

Opinion by Assistant Attorney General Bridges.

Dear Mr. Murphy:

Your request for an official opinion bearing date of March 20, 1964, is as follows: .

"Please refer to Act #39, Local Acts 1936, 1937, page #22 which creates the Russell County Court, and advise me if there is a legal way to collect my fees in cases adjudicated in this Court in the following manner:

"1. Where a Defendant is charged with a felony and the case is Nolle Prossed.

"2. Where a Defendant is sentenced to Hard Labor and the Sentence is suspended on good behavior.

"3. For Summoning Witnesses before the Grand Jury when no indictment is returned. Title 11, Section 100, Sub Section 4 provides a fee of .50c Act of 1945 approved July 7, 1945, while Acts of 1956, Page 367 allows .75c for the same service and was approved later April 14, 1956, which is legal in No Bill Cases."

In a telephone conversation you have explained that cases which are referred to in that part of your question numbered 1 are those where the Defendant is charged with a felony, brought into the County Court of Russell County for preliminary hearing, the charge then by agreement is reduced to a misdemeanor and, for good reason, finally nol prossed.

Act No. 39, Local Acts of 1937, page 22, referred to in your inquiry, created the County Court of Russell County. Those sections of Act No. 39 which are pertinent to your request are as follows:

"Section 2. That said court and its officers, shall have the same jurisdiction, powers, duties and practice as provided by the Statutes of the State of Alabama, relating to County Courts, except as herein otherwise provided."

"Section 6. That the Sheriff of Russell County, or his deputy, shall attend all sessions of said court, serve all processes, and his fees and compensation for his attendance and services in connection therewith shall be the same as allowed to him by law for similar services in the County Courts of this State."

"Section 8. That all fines, penalties and forfeitures imposed by said court, Solicitors' fees and trial tax shall be collected by the Clerk and paid into the Depository of the County, and shall constitute a fund known as 'County Court Fund,' and shall be kept separate from all other County funds."

"Section 10. The maintenance of said court shall be the same as provided by law for the maintenance of County Courts, except that any amounts expended therefor shall be paid out of the said County Court fund."

Under the circumstances delineated in that part of your question numbered 1, your fees may be paid from the County Court Fund. Sections 6, 8, and 10 of Act No. 39, supra, Quarterly Report of Attorney General, Vol. 10, p. 22. The payment of your fees depends upon there being a surplus in the County Court Fund. Title 15, Section 393, Code of Alabama 1940, Recompiled 1958 provides, in pertinent part, for such payment as follows:

"Whenever there shall be a **surplus** of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,' **or in cases in which the state enters a nolle prosequi**, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for." (Emphasis supplied)

Where a Defendant is sentenced to hard labor by the County Court of Russell County and that Court then suspends the sentence on good behavior, your fees may not be paid by the county. A county court is not authorized to suspend a sentence. Title 42, Section 20, Code of Alabama 1940, Recompiled 1958. No costs may be paid by the county when a prisoner receives an unauthorized suspended sentence.—Quarterly Report of Attorney General, Vol. 100, p. 35.

With regard to your question about the fee for summoning witnesses before the Grand Jury when no indictment is obtained, you are advised that Title 100(4), Code of Alabama 1940, Recompiled 1958, is the controlling statute and it authorizes the payment of \$.50 per witness served. This is the same provision as Act No. 413, General Acts 1945, page 658. The other legislative act to which you refer is Act No. 77, General and Local Acts 1956, page 367 which has to do with sheriffs fees in civil cases and does not affect in any way the sheriffs fees in criminal cases.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 5, 1964

Hon. J. O. English
Judge of Probate
Coffee County
Enterprise, Alabama

Licenses — Exemptions — Milk and Milk Control Board.

Milk distributors paying a license fee under Section 215 of Title 22, Code of Alabama 1940, as amended, are exempt from license fees levied by Section 611, Title 51, Code of Alabama 1940, where milk distributors also sell and deliver oleomargarine from motor vehicles in which milk is delivered.

Opinion by Assistant Attorney General George O. Miller.

Dear Sir:

Your request for an official opinion of recent date received by this office on April 1, 1964, is as follows:

"Citations have been issued against two dairy plants operating in Coffee County arising from the sale of margarine at retail, citing the said companies for failure to have obtained a 'Transient Vendor's and Peddler's' license as provided for in Title 51, Section 611(b) of the 1940 Code of Alabama.

"It has been brought to my attention that the Legislature during the 1961 regular session amended Title 22, Section 215 of the 1940 Code of Alabama by adding the following last sentence:

" 'A distributor, producer-distributor or bob-tailer, paying a license under this section shall be exempt from payment of a transient dealer's license levied under Section 609 of Title 51, and transient vendors' and peddlers' licenses levied under Section 611 of Title 51.'

"Title 22, Section 222 was likewise amended by striking therefrom that part of Section 222 which is underlined below:

" 'Section 222. Construction, exceptions and limitations.—The license required by this Chapter shall be in addition to all other licenses required by **any statute of Alabama** or any municipality of the State of Alabama.'

"Both dairy plants pay a distributor's license under Title 22, Section 215 as amended.

"Both dairy plants operate motor vehicles from which deliveries of milk and other products are made, one such produce being 'margarine.' The same motor vehicles used for the delivery of milk are used for the delivery of 'margarine.' Likewise the same driver-routemen employed for the delivery of milk are employed for the delivery of 'margarine.' In other words, the delivery of milk and margarine is one operation in every aspect and are not separate and distinct operations or businesses.

"I therefore respectfully request your opinion to the following question:

" 'Does the payment of a license under Title 22, Section 215 exempt the distributor licensee from the payment of a transient vendors' and peddler's license levied under Title 51, Section 611(b) for the sale of margarine by the said licensee?' "

Your request indicates that license collecting officials have taken the position that the two dairy plants or milk distributors referred to in your inquiry, both of which have a license as required under Section 215 of Title 22, Code of Alabama 1940, as amended, must also obtain a license as required under Section 611(b) of Title 51, Code of Alabama 1940, as amended, a transient vendors or peddlers license, because such milk distributors sell at retail oleomargarine, an artificially prepared product used as a substitute for butter, which is delivered to the purchaser by vehicle-driver routemen who make milk deliveries. You ask whether the payment of a license required under Section 215 of Title 22, Code of Alabama 1940, as amended, exempts the distributor-licensee from payment of the license required by Section 611(b) of Title 51, Code of Alabama 1940, as amended.

While your inquiry does not so state, I assume that the license officials have taken the position that the milk distributors are subject to the license requirement of Section 611(b) of Title 51, *supra*, because Section 215 of Title 22, *supra*, is a part of the statute which regulates the sale of milk in Alabama pursuant to the regulatory authority of the State Milk Control Board and oleomargarine is not a product which comes within the purview of this statute and, that, therefore, the exemption set forth under Section 215, *supra*, should be limited to persons who sell only milk and milk products regulated pursuant to the Milk Control Board law.

Additional facts furnished in connection with this matter indicate that these two milk distributors operate motor vehicles in which milk and milk products are delivered to the purchaser consumers by vehicle-driver routemen who deliver the products at regular intervals to the doorsteps of the home purchasers, and, in response to requests from some of these customers, oleomargarine is also sold and delivered to home

purchasers at the same time and in the same manner that milk is sold and delivered; that almost all of the dairy plant milk distributors in Alabama sell and deliver oleomargarine in this manner; that such home delivery sales of oleomargarine constitute less than one per cent of the total sales of each of the two milk distributors here involved; that almost all of such sales and deliveries are made pursuant to standing orders or orders made by telephone prior to delivery, but that a very small quantity of oleomargarine sales are made direct to home purchasers by the vehicle routemen at the time of delivery.

Sections 215 and 222 of Title 22 of the Code of Alabama 1940 were amended by Act No. 497 of the Legislature of 1961 (Acts of Alabama of 1961, page 579). A review of Section 215 of Title 22, and the amendment to this section by the Legislature of 1961 discloses that the amendment substantially increased the license fee levied upon distributors of milk and such amendment, among other changes, added the sentence, as set forth in your inquiry, that a distributor shall be exempt from the payment of a transient dealers and a transit vendors and peddlers license levied under Sections 609 and 611, Title 51, supra. The 1961 Amendatory Act, supra, amended Section 222 of Title 22, supra, another section of the Milk Control Board law, by changing the first sentence thereof to omit or delete therefrom the words underlined by you in this sentence as set out in your inquiry.

In view of the express provisions of Section 215 of Title 22, as amended by the Legislature of 1961, together with the change made in Section 222, Title 22, by the 1961 amendment, it seems to be rather clear that the Legislature intended to relieve a "distributor, producer-distributor, or bob-tailer" distributor of milk from the license requirements of Sections 609 and 611 of Title 51, as amended, supra, but the question for determination is whether the Legislature intended to exempt distributors of milk from such a license in the event they sell and distribute a product not covered by the regulatory provisions of Sections 205-231 of Title 22, supra, the statute which created the Milk Control Board and regulates the distribution and sale of milk in Alabama.

Whether exemptions from the imposition of various forms of taxation may be claimed by virtue of exemption provisions of statutes involve an application of principles of statutory construction and interpretation. It is a well settled rule that a tax exemption provision is to be construed strictly against the person claiming the exemption unless there is an express or apparent legislative intent that the exemption be construed otherwise. At first glance, it might appear that this rule of construction would furnish the answer to the question at hand and deny exemption to these milk distributors. But there is a stronger rule of statutory construction to the effect that the intent of the Legislature must be ascertained and full effect given thereto as all other rules of statutory construction are subservient to this rule. **Dixie Coaches v. Ramsden,**

238, Ala. 283, 190 So. 92. Also applicable is the rule that the court will indulge in no strained construction where a fair interpretation of legislative intent may be ascertained, and the intention of the Legislature must be determined from the language of the statute. *State v. Taylor*, 262 Ala. 639, 80 So. 2d 618.

The 1961 amendment to Section 215, *supra*, after making a substantial increase in the license fee required to be paid by a distributor of milk, also added the following words with reference to distributors:

"A distributor, . . . paying a license under this section shall be exempt from payment of a transient dealers license levied under Section 609 . . . and a transit vendors and peddlers license levied under Section 611 . . ."

Further examination of the 1961 amendment discloses that the first sentence of Section 222 of Title 22 read as hereinafter set out and the portion underlined was deleted by the 1961 amendment:

"Section 222. Construction, exceptions and limitations. — The license required by this Chapter shall be in addition to all other licenses required by **any statute of Alabama** or any municipality of the State of Alabama."

We can only learn or know of the legislative intent by what it has said. *Ex parte Wilson*, 269 Ala. 263, 112 So. 2d 443. To conclude that the milk distributors here involved should not be exempt from the license requirements of Section 611 would be tantamount to reading into the exemption provision of this statute that such distributors "are exempt from a transient dealers . . . and transit vendors and peddlers license . . . **provided such distributors of milk distribute and sell only milk and milk products as regulated hereunder.**" These underlined words or any other words of like import do not appear in the statute and I do not believe that any construction or interpretation should be adopted which would be equivalent to amending the statute to add these words.

In *Holt v. Long*, 234 Ala. 369, 174 So. 759, the Supreme Court of Alabama stated a well settled rule of construction:

" . . . courts must confine themselves to construction of the law as it is, and not attempt to . . . amend or change the law under the guise of construction."

In *May v. Head*, 210 Ala. 112, 96 So. 869, the Supreme Court of Alabama declared:

"The court has no authority to look for the legislative intention in

anything but the legislative language; . . . it cannot be detracted from or **added to**."

See also **State v. Commercial Loan Co.**, 251 Ala. 672, 38 So. 2d 571, wherein the Supreme Court said:

"If the legislature had wished it could have clearly provided . . . but it did not do this and while we may interpret the Act, we cannot amend it."

The case of **State v. Thames, Jackson Harris Co.**, 259 Ala. 471, 66 So. 2d 733, appears to be controlling of the question at hand as in this case the licensing authority sought to collect from a partnership engaged in the insurance business the license fee levied under Section 495(3), Title 51, Code 1940, for each person lending money on mortgages secured by real estate, etc., even though this statute provided that: ". . . insurance companies and their agents . . . otherwise taxed under the laws of this state, shall not be required to pay a license . . ." The State contended that the exemption should be confined to instances where the insurance companies and their agents otherwise taxed were lending only money of the insurance company and since the defendants were lending a substantial sum of their own money in addition to money belonging to the insurance company, the exemption should not apply. The Court rejected this contention and stated that in effect they were being urged to re-write the statute by adding to the exemption ". . . when lending money belonging to the insurance companies . . ." The Court ruled:

"It appears to us that the exemption 'to insurance companies and their agents which are otherwise taxed under the laws of this state' means that it says and requires no strained construction or the application of any arbitrary rule of construction."

* * *

"But it appears that the language of the statute is clear and unambiguous and does not lend itself to any fair and reasonable construction except that which we have placed upon it."

Another case involving an attempt to read additional words into a statute to limit or restrict an exemption provision is the case of **State v. Smith**, 256 Ala. 426, 55 So. 2d 130, wherein the State contended that the sales tax exemption provided for fertilizer should be limited and restricted to commercial fertilizer as regulated under the regulatory requirements of Article 16 of Title 2, Code of Alabama 1940, but the Court rejected this contention by saying:

"If it had been the legislature's intent to limit the exemptions to commercial fertilizer, the legislature could have so stated, but to

the contrary, the law as written exempts from taxation "all fertilizers', . . ."

See also cases of **State v. Rockwood Alabama Stone Co.**, 257 Ala. 220, 58 So. 2d 449; **State v. Calumet & Hecla Consol. Co.**, 259 Ala. 225, 66 So. 2d 726; **Holt v. Long**, 234 Ala. 426, 174 So. 759, which cases involve the same principle of statutory construction.

The express provisions or plain language of Section 215, Title 22, as amended by Act No. 497, Legislature of 1961, supra, together with the amendment to Section 222 of Title 22 clearly exempts milk distributors from the license levied by Section 611 of Title 51, supra; therefore, it is my opinion that to deny this exemption to milk distributors because of the sale of oleomargarine, a product ordinarily and customarily sold by such distributors, would be contrary to the legislative intent. If the Legislature had intended to limit or restrict the exemptions it could easily have done so.

In view of the foregoing the answer to your question is in the affirmative as the milk distributors referred to in your inquiry are not subject to a transient vendors and peddlers license because of their sales of oleomargarine.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 5, 1964

Honorable Ralph P. Eagerton
Chief Examiner, Department of
Examiners of Public Accounts
C A P I T O L

Licenses — Motor Vehicles — License Inspectors — Fines —
Highway Patrol — Opinions Overruled, Modified or Dis-
tinguished.

1. Fines collected for violation of Title 36, Section 75, Code of Alabama 1940, as amended, go to the county in which indictment is found or prosecution begun regardless of who makes the arrest. Title 15, Section 392, Code of Alabama 1940.

2. Quarterly Report of Attorney General, Vol. 58, page 119, modified to conform with this opinion.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have your request for an official opinion bearing date of April 29, 1964 which reads as follows:

"I request your opinion as to proper distribution of fines levied for violations of the provisions of Title 36, Section 75, Code of Alabama 1940, as amended, when the arrest is made by a State Highway Patrolman."

Title 36, Section 75, Code of Alabama 1940, as amended (Act No. 143, Acts of Alabama 1961, page 2085), provides a penalty for persons operating motor vehicles on public roads or streets of this state without a regularly prescribed license tag on the rear end of such motor vehicle. The various crimes that may be prosecuted under the provisions of Section 75, *supra*, have been previously set out in an opinion of this office reported in Quarterly Report of Attorney General, Vol. 58, page 119, modified to a certain extent not applicable to this particular opinion in Quarterly Report of Attorney General, Vol. 64, page 51.

In setting out the offenses properly charged under Section 75, *supra*, the opinion reported in Vol. 58, *supra*, referred to the violations as "Rules of the Road" violations and further stated, "For violations of this nature, the highway patrol may make arrests and institute criminal proceedings, as it may for other offenses of the Rules of the Road, such as reckless driving, etc."

As I understand the background of your question, the above-quoted words of this opinion have left some doubt in the minds of various public officials as to proper distribution of fines levied under the provisions of Section 75, *supra*, since ordinary Rules of the Road are classified as those crimes designated under the provisions of Title 36, Section 1 through 58(53), Code of Alabama 1940, as amended, and distribution is provided for those fines under Section 53, *supra*. Distribution of fines under the provisions of Section 53, *supra*, specifically apply only to those fines levied for violations of the provisions of "this chapter" (Chapter 1). You will note, however, that Section 75, *supra*, is located in Chapter 2, Article 2 of Title 36, *supra*, and, although a provision is made for distribution of fines collected under the provisions of Article 1 of Chapter 2, I find no provisions made for distributions of fines collected under the provisions of Article 2 of Chapter 2 and I am, therefore, of the opinion that the fines shall go to the county in which the indictment was found or the prosecution commenced under the provisions of Title 15, Section 392, Code of Alabama 1940, regardless of who the arresting officer

might be. Quarterly Report of Attorney General, Vol. 58, page 119, is hereby modified accordingly.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 5, 1964

Mr. W. W. Lazenby
Tax Assessor
Lee County Court House
Opelika, Alabama

Ad Valorem Taxes—Fallout Shelters

1. Under the provisions of Act No. 153, Special Session 1961 Legislature, amending Section 17, Title 51, Code of Alabama 1940, the owner of a radioactive fallout shelter which is added to the premises is entitled to an exemption from ad valorem taxation to the extent of \$200.00 per planned occupant, upon the prescribed certificate being issued by the Department of Civil Defense, and upon the owner presenting the certificate to the Tax Assessor, regardless of whether or not the owner takes into consideration the value of the fallout shelter in listing his property for assessment.

2. Whether or not the owner of the fallout shelter is required to list it for assessment as a part of the realty, is a matter which addresses itself to the owner, the Tax Assessor and the Board of Equalization under the general laws governing the listing and assessment of property, additions and improvements for ad valorem tax purposes as is provided in Title 51, Sections 21, 37, 39, 41, 45, 105, among others, Code of Alabama Recompiled 1958.

Opinion by Assistant Attorney General Burton

Dear Sir:

This will acknowledge your request for an official opinion from this office dated February 26, 1964, which is as follows:

“A taxpayer owns a house and lot assessed at \$5,000.00 and has been assessing this property for at least 10 years at the same value \$5,000, in Opelika. He constructed a fallout shelter, attached to

his residence, at a cost of \$2,000. He has not increased his assessment above the \$5,000. The shelter is constructed to accomodate two people. He now requests that I give him credit for two hundred each or a reduction of \$400.00 off this \$5,000 assessment. He cites me to Acts 1961 page 2101. My construction of this that property owner would first be required to assess the shelter before any credit could be claimed.

"Will thank you for a ruling at your earliest convenience as we will in all probability have more request."

Additional information furnished by you over the telephone is that the tax year involved is the 1964 year commencing on October 1, 1963, and ending September 30, 1964. You have also informed us that the radioactive fallout shelter had been constructed and was a part of the premises involved on October 1, 1963, at the beginning of said tax year.

Section 17, Title 51, Code of Alabama 1940, was amended effective October 1, 1963, by Act No. 153 of the Special Session of the 1961 Legislature, Acts 1961, Volume II, page 2101, to include an examination from the ad valorem tax assessment not to exceed \$200.00 per planned occupant for radioactive fallout shelters. Section 17, *supra*, and as so amended, now reads as follows:

"All taxable property within this state shall be assessed for the purpose of taxation at sixty percent of its fair and reasonable market value less any value not exceeding \$200.00 per planned occupant which is added by construction of a radioactive fallout shelter, as approved and certified by the state department of civil defense." [Emphasis supplied.]

The part which is emphasized represents that part of Section 17 that was added by the 1961 Amendment.

Your question is whether or not the shelter as so constructed and affixed to the premises must be assessed as a part of the realty for said tax year, and the assessed value thereof added to the assessment of the realty, before the taxpayer can take the deduction for such shelters as is provided for under Act 153, *supra*. In other words, can the deduction be given to the taxpayer upon his presenting to the Tax Assessor the certificate issued by the State Department of Civil Defense, without the taxpayer assessing the fallout shelter as a part of the realty?

Your question is answered to the effect that the granting of the exemption as is provided in Section 17, as amended, *supra*, and to the extent of \$200.00 per planned occupant in the fallout shelter is not made in any respect contingent upon the owner listing the fallout

shelter as an improvement or as a part of the realty for the purpose of assessment. Thus, the one is independent of the other. The exemption is to be granted upon the issuance of the prescribed certificate by the Department of Civil Defense, and upon the certificate being presented to the Tax Assessor, regardless of whether the fallout shelter has been listed by the owner for the purpose of assessment.

Although it is not necessary in order to be entitled to the exemption to do so, this does not mean that the owner is relieved of listing the fallout shelter for assessment. Nor does it mean that the Tax Assessor or the Board of Equalization in the performance of their duties should not place an added assessed value upon the owner's property, if such additional value accrued by virtue of such being an improvement. This would be governed entirely by the general ad valorem tax laws, including Title 51, Sections 21, 37, 39, 41, 45, 105, among others, Code of Alabama Recompiled 1958.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 11, 1964

Honorable Les Gilliland
Mayor, City of Gadsden
City Hall
Gadsden, Alabama

Municipalities.

Authority of the Civil Service Board and the City Commission of the City of Gadsden to supervise and control the operation of the municipal fire department discussed generally.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of April 15, 1964, is as follows:

"The City Commission of the City of Gadsden, Alabama, respectfully requests your opinion to the following question.

"On January 14, 1964, Z. E. Wright, Chief of the Fire Department of the City of Gadsden, recommended to the Civil Service Board of the City of Gadsden that H. G. Parnell, a member of the Gadsden

Fire Department since April 15, 1944, and assigned to duty in the Fire Prevention Bureau within said Fire Department, be promoted from Inspector Lieutenant to Inspector Captain, and that W. B. Houston, a member of the Gadsden Fire Department since January 15, 1951, and assigned to duty in the Fire Prevention Bureau within said Fire Department, be promoted from Regular Inspector to Lieutenant Inspector. A copy of the letter of recommendation is attached as Exhibit 'A.'

"The rules and regulations of the Civil Service Board of the City of Gadsden provide for promotion on the basis of seniority. A copy of the pertinent rules and regulations with respect thereto is attached as Exhibit 'B.' There were members of the Fire Department assigned to duty in the regular fire fighting division of said department who were senior to both H. G. Parnell and W. B. Houston.

"Thereafter, at a meeting held on January 18, 1964, and in accordance with said recommendations, the Civil Service Board of the City of Gadsden promoted the said H. G. Parnell and W. B. Houston. The said recommendations were in direct violation of orders given to the Chief of the Fire Department by the Commission of Public Safety not to place but one man in the Fire Prevention Bureau as an Inspector. The Chief of the Fire Department was further instructed to get approval of any expenditures for the Fire Department before recommendations or commitments for said expenditures were made. The City Commission had no notice of the Civil Service Board meeting and no opportunity to be heard. A copy of the minutes of said meeting of the said Civil Service Board is attached as Exhibit 'C.'

"Provision for a Fire Prevention Bureau is made in City Ordinance No. 1861. A copy of this ordinance is attached hereto as Exhibit 'D.' Ordinance No. 1861 was amended on January 21, 1964, by Ordinance No. 1876. A copy of Ordinance No. 1876 is attached hereto as Exhibit 'E.' On January 21, 1964, Z. E. Wright, Chief of the Fire Department was again instructed by Commissioner Hubbard to reduce the Fire Prevention Bureau to one man and to comply in the future with said Ordinance No. 1876. A copy of the memorandum of said Commissioner Hubbard to Chief Wright is attached as Exhibit 'F.' In compliance with this order Chief Wright assigned Captain Parnell to duty in the regular fire fighting division and assigned W. B. Houston to serve temporarily as Inspector in the Fire Prevention Bureau.

"The City of Gadsden has never paid H. G. Parnell and W. B. Houston on the basis of their alleged promotion. We, therefore, pose the following questions:

"1. Considering the fact that there were no vacancies in the Fire

Department, the promotions that were made created new jobs of Captain and Lieutenant. Further considering that the City Commission had made no appropriation to cover the funds to pay for the promotions to Captain and Lieutenant, did the City Commission act within its authority under Title 62, Section 420?

"2. The City Commission had previously ordered the Chief of the Fire Department to assign one man as a Fire inspector. Does the City Commission have the authority to determine the number of employees and assign their duties in the Fire Department so long as it is not in conflict with the provisions of the Civil Service law?

"3. Can the Civil Service Board create new positions within the department when no funds have been provided for same?

"4. Can the Civil Service Board create an act that results in the Civil Service Board appropriating funds to be paid out of the city's treasury?

"5. Did the City Commission act within its authority when it passed an ordinance placing the Fire Prevention Bureau under the Civil Service Board?

"6. In the event your answer to question 5 is yes, can the City Commission of the City of Gadsden lawfully prescribe the conditions under which the Civil Service Board of the City of Gadsden shall determine qualifications for the positions in the Fire Prevention Bureau and/or Fire Inspectors?

"7. In view of the circumstances outlined in this case, the Civil Service Board under similar circumstances allegedly could make all men in the department Captains and Lieutenants or hypothetically speaking could make all men in said department Chief or Assistant Chiefs. Does the Civil Service Board have the authority to perform such acts and appropriate funds from the city's treasury to pay for the new jobs created in the said Fire Department?

"8. Assuming that said promotions were valid, did the adoption of Ordinance No. 1876 amending Ordinance No. 1861 in compliance with which said H. G. Parnell and W. B. Houston were assigned to other duties within the Fire Department of the City of Gadsden in any manner affect said promotions?"

Your purpose will be better served if you have from me a general discussion of the applicable law rather than specific answers to each of your questions.

The powers and duties of the City Commission of the City of Gadsden

are prescribed by Act No. 112, Acts of Alabama 1951, page 337, as amended by Act No. 952, Acts of Alabama 1961, page 1531. Section 3 of said Act reads as follows:

"Each officer and employee of each such city shall be selected and employed by the said Board of Commissioners, shall be under its direction, and receive such salaries, wages or compensation as may be fixed by said Board of Commissioners. The Board of Commissioners shall prescribe and may at any time change the powers, duties and titles of all such officers and employees of said city, all of whom shall hold office and be removable at the pleasure of the Board of Commissioners. The authority herein given is subject to the provisions of any Civil Service or merit system law applicable to said city."

The Civil Service System governing the Police and Fire Departments of the City of Gadsden was created and is controlled by Act No. 671, Acts of Alabama 1951, page 1158, as amended by Act No. 49, Acts of Alabama 1956, page 341 and Act No. 956, Acts of Alabama 1961, page 1536. Quarterly Report of Attorney General, Vol. 72, page 69.

Act No. 671, as amended, *supra*, vests the power to fill vacancies in the office of Chief of the Fire Department in the Civil Service Board. Said Fire Chief has the power to appoint all other members of the Department from a list of those eligible for appointment furnished by the Civil Service Board. The power to promote, demote, suspend and dismiss members of the Fire Department is vested in the Fire Chief and the Civil Service Board. Such power must be exercised in accordance with the provisions of Act No. 671, as amended, *supra*.

It is the duty of the Civil Service Board to make rules and regulations which may seem necessary to said Board to carry out the provisions of Act No. 671, as amended, *supra*. This statutory duty carries with it the authority to amend these rules and regulations and to make specific exceptions thereto at any time.

Section 4 of Act No. 112, as amended, *supra*, provides that Associate Commissioner No. 2 shall have direct supervision over the Division of Public Safety which includes the Fire Department. However, it is obvious that much of the authority of the city governing body to control and direct the Fire Department granted by Act No. 112, as amended, *supra*, has been vested in the Fire Chief and the Civil Service Board by Act No. 671, as amended, *supra*. The City Commission and the Associate Commissioner No. 2 are authorized to direct the activities of the Fire Department and to assign the members thereof to certain departments. However, since all disciplinary authority over the members of the Fire Department is vested in the Fire Chief and the Civil Service Board, there is no method by which the city governing body may enforce its directions.

Act No. 671, as amended, *supra*, does not divest the City Commission of the authority to fix the salaries, wages or other compensation of the members of the Fire Department and to appropriate funds with which to operate said Fire Department. Thus, the Civil Service Board must depend upon the cooperation of the City Commission in providing funds with which to pay higher salaries to those members of the Fire Department who are promoted by said Board.

As indicated hereinabove no attempt has been made to answer specifically each question contained in your request. From the above discussion of the applicable law it can be seen that satisfactory solutions to the problems presented by your request may be reached only by cooperation between the Civil Service Board and the City Commission of the City of Gadsden.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 14, 1964

Honorable Forrest L. Adams, Solicitor
Twentieth Judicial Circuit of Alabama
Dothan, Alabama

Gaming and Lotteries — Criminal Law

Sales promotion plan, sponsored by a soft drink manufacturer who gives prizes to ones selected who happen to have in their refrigerator the soft drink of the manufacturer, does not constitute a lottery. The selection is done at random, and agents or employees of the soft drink manufacturer call at the homes of those so selected.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of March 9, 1964 is as follows:

"It has come to my attention that a local soft drink manufacturer is conducting a sales promotion campaign by radio wherein said manufacturer advertises its product, and states that its agents or employees are calling at various homes in the community and inquiring as to whether or not the occupant of the homes called upon have the soft drink product of said manufacturer in the refrigerator. It is

stated that, in the event such product is found to be in the home or homes called upon, that the homeowner or occupant will be given a silver dollar for each bottle of the product found to be in the refrigerator at the time of the visit of the agent or employee of the soft drink manufacturer. It is further my understanding that such advertising programs include taped conversations between the agent or employee of the soft drink manufacturer and persons called upon at their home, wherein it is revealed that the persons called upon were awarded the prize for having such product in their refrigerator, or were not awarded such prize if the product was not found to be there, but instead were left one or more cartons of the product advertised.

"Under the above statement of facts, I request your official opinion as to the following:

"(1) Does the sales promotion campaign outlined above constitute a lottery in violation of Section 275, et seq, Title 14, Code of Alabama, 1940?

"(2) Assuming that your answer to the above question is in the affirmative, is the radio company guilty of participating in said lottery or gift enterprise?"

In a telephone conversation you have advised that the homes to be called upon by the agents or employees of the soft dring manufacturer are selected at random.

I am of the opinion that, under the facts stated, your first inquiry should be answered in the negative. This obviates the necessity of answering the second.

The courts of this state have defined a "lottery" or scheme in the nature of a lottery as a plan in which a prize is set up and awarded by chance for the right to participate in which a consideration is paid. A lottery has three elements: (1) a prize (2) awarded by chance (3) for a consideration.—**Grimes v. State**, 28 Ala. App. 4, 178 So. 69. See also **Grimes v. State**, 235 Ala. 192, 178 So. 73, Quarterly Report of Attorney General, Volume 49, page 30.

Under the facts presented, there is no question of the existence of the element of (1) a prize. As to the (2) award being made by chance and (3) for a consideration, very questionable situations are presented. Here the element of chance is that the possible winner is selected at random from all the people who are fortunate enough to have a refrigerator in their home. They do nothing by their own efforts to have their names put in a drawing container such as filling out a blank

card or the like. As to the element of consideration, the beverage in question is merely bought by the prospective winner at the regular retail price and, as far as the evidence shows, without regard as to whether he will win a prize or not. As to these two elements of a lottery, it is my judgment that neither the element of an (2) award being made by chance nor the element of (3) for a consideration is sufficient to label the operation a lottery.—**Clark v. State**, 262 Ala. 463, 80 So.2d 312; See **Clark v. State**, 38 Ala. App. 78, 80 So.2d 308; Quarterly Report of Attorney General, volume 57, page 86.

The instant situation is distinguishable from the opinion in Quarterly Report of Attorney General, Volume 49, page 30, as the facts in that opinion show that the prospective winner made a purchase of the drink in question and filled out a card which was put in a container from which the winner was drawn.

The foregoing is merely an expression of my opinion in regard to the facts presented. It must be borne in mind that the ultimate determination of the question involved turns upon the facts in each situation. Such determination is one that falls within the province of the court or jury when presented in a proper forum. — It is not a matter upon which this office may conclusively decide. Quarterly Report of Attorney General, Volume 41, pages 23 and 37.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 15, 1964

The City Council
City of Midfield
Midfield, Alabama

Municipalities.

A municipality has no authority to regulate the issuance of trading stamps or similar merchandising devices.

Opinion by Assistant Attorney General Gish.

Dear Sirs:

Your request for an official opinion, dated March 23, 1964, is as follows:

"BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDFIELD, ALABAMA, AS FOLLOWS:

"1. That the Attorney General of the State of Alabama be and he hereby is requested to furnish the City Council of the City of Midfield an advisory opinion as to the constitutionality and/or legality of the ordinance hereby attached.

"2. That the enforcement and effective date of this ordinance be and the same is postponed pending receipt of the opinion herein requested any provision in said ordinance to the contrary notwithstanding.

"3. That a certified copy of this Resolution together with a Certified copy of said ordinance shall be forthwith transmitted to the Attorney General of the State of Alabama which shall constitute the official request for the opinion herein sought."

The ordinance attached to said request is as follows:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDFIELD, ALABAMA, AS FOLLOWS:

"SECTION ONE. No person, firm, corporation, or association within the City of Midfield, Alabama, shall use, give, offer, issue, transfer, furnish, deliver or cause or authorized to be furnished, or delivered to any other person, firm, corporation, or association within the City of Midfield, in connection with the sale of any goods, wares or merchandise, any trading stamps, token, ticket, bond or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise, privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond or other similar device, unless such trading stamp, token, ticket, bond or other device is also redeemable in cash at an amount clearly stated on the face of such stamp, token, ticket, bond or other similar device.

"SECTION TWO. The cash redemption value of each such stamp, token, ticket, bond or other similar device shall be not less than one mill or one tenth of one cent.

"SECTION THREE. The publication by or distribution through newspapers or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this ordinance, and provided further that this ordinance shall not apply to any coupon, certificate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer.

"SECTION FOUR. The provisions of this ordinance are severable. If any part of the ordinance is declared invalid or unconstitutional, such declaration shall not effect the part which remains.

"SECTION FIVE. All ordinances or parts of ordinances in conflict with this ordinance are repealed.

"SECTION SIX. This ordinance shall become effective immediately upon its adoption, approval and publication as required by law.

"SECTION SEVEN. Any person, firm, corporation or association violating any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine not to exceed \$100.00 or by imprisonment in the City Jail not to exceed 180 days, or by both such fine and imprisonment at the discretion of the Judge or Recorder trying the same."

A municipality is an instrumentality of the State. Its powers are derived from and must be conferred by the legislature. **Town of Graysville v. Johnson**, 33 Ala. App. 479, 34 So. 2d 708. It may exercise only those powers granted in express words, those necessarily or fairly implied in or incident to powers expressly granted, or those essential to the declared objections and purposes of the corporation. **City of Bessemer et al v. Huey**, 247 Ala. 12, 22 So. 2d 325; and **Johnson v. City of Sheffield et al**, 236 Ala. 411, 183 So. 265.

No statute in this State expressly grants to a municipality the authority to regulate the issuance of trading stamps or similar merchandising devices.

In the case of the **City Council of Montgomery v. Kelly**, 142 Ala. 552, 38 So. 67, the Supreme Court of Alabama held that a municipality may not use its power to levy license taxes to regulate the issuance of trading stamps. The opinion in this case reads in part as follows:

"Without entering into the various definitions which have been given, in order to distinguish between a license, which is strictly a police regulation, and one which is simply a privilege tax on the occupation, we think it is safe to say that, in this case, there can be no license tax imposed except one which is simply a privilege tax on the business. Not only does the ordinance itself fail to provide for any regulations which would indicate an exercise of the police powers, but the character of the business, shows it to be one of the legitimate and useful lines of trade, which neither the state nor the municipality can subject to police regulations, with any color of reason."

Therefore, neither the municipal police power nor any other statutory power grants to a municipality the implied authority to regulate

the issuance of trading stamps or similar merchandising devices. Cf. **Ward et al v. Markstein**, 196 Ala. 209, 72 So. 41.

Premises considered, I am of the opinion that the City of Midfield has no authority to enforce the ordinance here considered.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 15, 1964

Honorable James T. Adams
Auditor, Madison County
Huntsville, Alabama

Counties — Jails — Physicians

Counties are authorized to elect a physician or physicians necessary to attend inmates of county poorhouses and jails in such counties, and convict camps, under the provisions of Title 45, Sections 140 and 141. The proviso "jails in such counties" includes detention homes.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of May 12, 1964 is as follows:

Your opinion is respectfully requested as to the legality of the Madison County Board of Commissioners selecting a county physician to serve the Madison county jail and Detention home. The code of Alabama book 9, Title 45, Section 140 and 141 sets out, in our opinion, that county governing bodies may select a county physician, no other county in Alabama to our knowledge has at this time a physician employed, therefore we would appreciate your opinion."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 45, Sections 140 and 141 provide as follows:

"§ 140. **Physicians elected to attend inmates of poorhouses and jails.**

—The courts of county commissioners or boards of revenue in the various counties in this state may elect a physician or as many physicians as in their discretion may be necessary to attend the inmates of the county poorhouses and jails in such counties, and county convict camps.

“§ 141. Term of office and compensation determined by board.—Such courts shall fix and determine the term or terms of such physician or physicians, which term or terms of office shall not be for a longer period than two years, and may be removed at the will of such courts, and such courts shall fix and determine the amount of compensation, which shall be paid to such physician or physicians and shall determine what duties such physician shall perform.”

The above is specific authority for the county governing body in its discretion to elect a physician or physicians to attend the inmates of the county poorhouses and jails in such counties, and county convict camps. The proviso “jails in such counties” unquestionably embraces the county. It also, in my opinion, includes the detention home referred to in your letter, which I assume was constructed and is maintained under the provisions of Act No. 59, Acts of Alabama 1963, page 221, which provides for detention homes for juveniles, etc., in counties of from 110,000 to 160,000 population (Madison County).

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 20, 1964

Honorable Archie I. Grubb
City Attorney
Eufaula, Alabama

Ad Valorem Taxes — Assessments — Revenue Department of

A final assessment for taxes made by the Department of Revenue and not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized by Section 139 of the Constitution and is conclusive as such.

Opinion by Assistant Attorney General Livingston

Dear Sir:

Your request for an official opinion dated May 6, 1964 is as follows:

"I enclose herewith certified copy of resolution adopted by the City Council of the City of Eufaula at its regular meeting of last night requesting your opinion on the questions hereinafter enumerated.

"The facts are set out in said resolution and in my letter to the Tax Collector of Barbour County, a copy of which is attached to and made a part of said resolution. For any additional facts that may be of assistance to you in deciding these questions, may I respectfully refer you to the State Department of Revenue, as it has made a thorough investigation of this taxpayer's liability, both before and after its making of this assessment. It is my understanding that since said assessment became final this taxpayer has sought reconsideration by said Department, which request was denied inasmuch as the Department took the same position I am now taking with regard to its conclusiveness. It is my further understanding that the Department's investigation also included ascertainment of whether or not this corporation or its stockholders received tax advantages in other states or municipalities thereof by transferring to it foreign owned assets including real estate or interests therein. For your information, the certificate of incorporation designates Eufaula as its principal office, but it is contended that it has never had an office in said city. The findings and records of said Department are accordingly adopted and made a part of this request for your opinion.

"The questions presented are as follows:

"1. Has the Tax Collector the right or authority to collect the State and County portions of said final assessment without at the same time collecting the City's share thereof?

"2. Has the Probate Court the jurisdiction or authority to inquire into this assessment or the City's portion thereof with the view of determining the validity or invalidity thereof and hence rendering a decree denying a sale of the property?

"3. What is the status of the City insofar as asserting protecting its rights in the pending proceedings?

"4. What is the duty of the Tax Collector to said City in said proceedings?

"5. What is the duty of the Probate Judge to said City in said proceedings?

"6. What is the legal effect of a decree of said Probate Court purporting to invalidate or set aside said assessment or denying a sale of said property to collect the City's portion of said assessment?

"7. In the event of the rendition of a decree by said Probate Court

purporting to invalidate or set aside said City's portion of said assessment and denying a sale of said property to satisfy same, what is the proper legal remedy of said City to protect its rights in the premises?

"8. In the event of such adverse decree, whose duty is it under Title 51, Section 272, Code of Alabama 1940, to take the appeal therein provided for?

"9. What are the respective duties of the Tax Collector and Probate Judge in the event of the rendition of such adverse decree?

"10. What are the duties of the State or the State Department of Revenue in the event of such adverse decree?

"11. What are the duties of the Circuit or County Solicitor in the event of the rendition of such adverse decree?

"12. What are the respective liabilities of the Probate Judge, Tax Collector and Tax Assessor to the City of Eufaula under their official bonds (Title 37, Section 731, Code of Alabama 1940)?

"13. What, if any, jurisdiction does the Circuit Court of Barbour County have under the circumstances?

"14. What are the rights, duties and obligations of the City Council of the City of Eufaula under the provisions of Title 37, Section 729, Code of Alabama 1940?

"15. Does the taxpayer now have the right of appeal from a decision of said City Council disallowing its petition filed under Title 37, Section 729?

"16. Is said City Council legally required to or legally prevented from allowing said claim (Title 37, Section 729) if it determines that said corporation did not in fact maintain an office within said city during the five year period included in said assessment?

"17. Specifically, the State Department of Revenue having initiated and made this final assessment including therein escaped taxes due the City of Eufaula and the Tax Collector having instituted proceedings to enforce the collection thereof, is not said Department now required by law to use the facilities of its legal division to do whatever is necessary to enforce the collection thereof to the extent of instituting and defending such legal action as is required?

"It is realized that you always have a backlog of requests for

opinions which are of necessity time consuming. However, on account of the extreme importance and urgency of this matter, not only to the City but to a number of State and County officials as well, it is respectfully requested that you give this request preferential status inasmuch as irreparable injury may result in delay."

The resolution of the City Council is as follows:

"A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EUFAULA, ALABAMA, REQUESTING AN OPINION OF THE ATTORNEY GENERAL OF ALABAMA.

"WHEREAS, the following facts have just been brought to the attention of the City Council of the City of Eufaula, Alabama:

"That some time ago the State Department of Revenue made a final tax assessment against Ames Timber and Land Company, a domestic corporation, in an amount in excess of \$20,000.00, of which approximately \$6,000.00 represented delinquent taxes due the City of Eufaula, Alabama, which assessment was not appealed from as provided by law. That there was reported by the Tax Collector of Barbour County, Alabama, under the authority of Title 51, Section 249, Code of Alabama 1940, his inability to collect said taxes so assessed without a sale of certain real estate in Barbour County, Alabama, owned by said corporation. That this matter was set for trial before the Probate Court of Barbour County, Alabama, on May 4, 1964, and that the only notice of said hearing given said city was by verbal notice to its City Attorney, Archie I. Grubb, on May 1, 1964. That, prior to said hearing, said City Attorney served on the Tax Collector of Barbour County, Alabama, a letter in which he outlined his opinion as to the duty of said Tax Collector, that of the Tax Assessor of Barbour County, Alabama, and of the Probate Judge of Barbour County, Alabama, copies of which said letter were also served on said Tax Assessor and said Probate Judge prior to said hearing, a copy of which letter is attached hereto and made a part of this resolution as fully as if herein set out in detail.

"That said City Attorney is informed that said Probate Judge did on May 4, 1964, entertain jurisdiction of said taxpayer's contest of said city's portion of said tax assessment by hearing testimony offered by and on behalf of said taxpayer tending to show the invalidity of said portion of said assessment and has taken the matter under advisement.

"That Title 51, Section 272, Code of Alabama 1940, provides an appeal from any decree rendered by said probate court for the sale of real estate for the payment of taxes by the defendant in the cause of the state, in behalf of itself and the county, to the circuit court,

in equity, of such county, within thirty days after the rendition of such decree. Specifically, there is no expressed provision for an appeal by or on behalf of a municipality. Said section also provides that the solicitor of the circuit or county court shall represent the state on such appeal, and of the pendency thereof the judge of probate must give him notice in writing. There is no provision in said section or elsewhere for notice to said municipality; and,

"WHEREAS, from the foregoing, it is apparent that the advice or opinion of the Attorney General of the State of Alabama is necessary to the present performance of some official act that the City Council of the City of Eufaula, Alabama, must immediately perform in the event of an adverse decree rendered by said Probate Judge of Barbour County, Alabama.

"NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EUFAULA, ALABAMA, in regular meeting assembled, that its said attorney, Archie I. Grubb, submit a request for an opinion by the said Attorney General of Alabama on the several questions herein involved.

"BE IT FURTHER RESOLVED by said City Council that, in view of the fact that said decision is now under consideration by said Probate Judge, said opinion so requested be issued as soon as practically possible in order to protect the rights of said city and its taxpayers.

"Adopted this 5th day of May, 1964.

"ATTEST:

"S/ Eugene C. Parker
City Clerk

S/ Fate Calton
President of Council

"Approved this 5th day of May, 1964.

"S/ Marvin E. Edwards
Mayor

"C-E-R-T-I-F-I-C-A-T-E

"I, Eugene C. Parker, as City Clerk of the City of Eufaula, Alabama, hereby certify that the attached pages constitute a true and correct copy of a resolution adopted by the City Council at a regular meeting held on May 5, 1964.

"WITNESS my signature as said city clerk, under the seal of said city, this ___6th___ day of May, 1964.

"S/ Eugene C. Parker
City Clerk

"(Seal)"

Your letter to the Tax Collector is as follows:

"Honorable Stanley Baker,
Tax Collector of Barbour County
Clayton, Alabama

"Dear Stanley:

"Last Friday afternoon, May 1, 1964, Mr. Albert F. Simson, Jr., informed the writer, as attorney for the City of Eufaula, in substance as follows:

"That sometime ago the State Department of Revenue had made a final tax assessment against Ames Timber and Land Company, a domestic corporation, in an amount in excess of \$20,000.00 of which approximately \$6,000.00 represented delinquent taxes due the City of Eufaula which assessment was not appealed from as provided by law. That there had been reported to the Probate Court of Barbour County, presumably by you as Tax Collector under the authority of Title 51, Section 249, Code of Alabama 1940, your inability to collect said taxes so assessed without a sale of certain land owned by this corporation in Barbour County. That this matter was set for trial before the Probate Court on Monday, May 4, 1964. That he, as attorney for said corporation, intended to pay that portion of the delinquent tax assessment due the State and County and contest the portion due the City of Eufaula on the ground that it was invalid, inasmuch as said corporation had in fact never had its principal place of business nor otherwise done business within said city. That he intended to offer evidence in support of this contention and hoped to obtain from the Probate Court a decree invalidating and setting aside the assessment insofar as it pertains to the City's share of said assessment, thus preventing a sale of said property.

"Since receiving this information from Mr. Simson, I have looked into the matter as best I could with my limited knowledge of the pending proceedings and also the limited time available. In this connection, I tried to reach you by telephone Saturday afternoon and night, but was unable to do so. For this reason I am writing you my thoughts about the matter for whatever benefit they may

be to you at the trial. Copies of this letter are being delivered to the Probate Judge and Tax Assessor for the reasons hereinafter stated.

"As you are aware, you have been collecting the City of Eufaula's taxes since, I believe, 1949, under the provisions of Title 37, Section 781, Code of Alabama 1940. This section imposes upon you the duty to collect the City's taxes **'at the same time and in the same manner and under the same laws that state and county taxes are collected.'**

"Title 37, Section 730, Code of Alabama 1940, provides that you must **'collect or enforce the collection of such municipal taxes at the same time, in the same manner and way, and as a part of one and the same collection as the collection of state and county taxes and all procedure incident to or in any wise connected with the collection of state and county taxes shall be equally applicable to the collection of said municipal taxes and all such municipal taxes shall be collected in the same way and in the same proceedings as state and county taxes.'**

"Title 37, Section 731, Code of Alabama 1940, provides as follows:

" 'The official bond of the judge of probate and of the county tax assessor and of the county tax collector in the counties in which such municipalities are situated, shall be and shall be held to be for the protection of such municipalities for the faithful discharge of the duties of such officers to such municipalities in the same manner and way as it is for the protection of the state of Alabama and the counties in which such municipalities are situated.'

"Title 51, Section 256, Code of Alabama 1940, places upon you the duty to attend this hearing and to have with you your tax book which I assume will show this final unappealed from assessment of the State Department of Revenue. This section provides that **'such book shall, in all cases, be accepted as prima facie evidence.'**

"It is my opinion that you cannot legally accept payment of the state and county portion of this assessment without at the same time receiving payment of the city's portion and that this would be true even if the probate Judge should make a decree purporting to invalidate or set aside the city's portion of the assessment as it would be void. I base this opinion on the recent decision of the Supreme Court of Alabama (October 18, 1962) in the case of **Sparks v. Brock & Blevins Inc.**, 274 Ala. 147, 145 So. 2d 844, wherein it laid down the rule in the following language:

" 'The rule in our jurisdiction is that a final assessment of the Department of Revenue unappealed from is as conclusive as a judgment

of a circuit court of Alabama, and may be impeached only by a direct proceeding not being subject to collateral attack. *State v. Woodruff*, 253 Ala. 620, 46 So.2d 553; *State ex rel. Carmichael, Atty. Gen. v. Jones*, 252 Ala. 479, 41 So.2d 280. The right of appeal is clearly statutory and must be exercised in the mode and within the prescribed time. *State v. Ide Cotton Mills*, 175 Ala. 539, 57 So. 481; *Ross Jewelers v. State*, 260 Ala. 682, 72 So.2d 402, 43 A.L.R. 2d 851. The action for a declaratory judgment in the instant case was in effect a collateral attack on a final judgment. The language of the court in *State v. Woodroof*, *supra*, is here appropriate:

“ ‘The final assessment not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized by section 139 of the Constitution, and is conclusive as such. Being rendered on March 29, 1948, and no appeal having been taken in thirty days, section 140, *supra*, no attack can be made upon it except such as applies to an ordinary court judgment. It therefore conclusively fixed the amount of the tax claim as of March 29, 1948. *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So.2d 280 (10, 11).’

“See also **Fuqua v. Spry Burial Ins. Co.**, 254 Ala. 189, 47 So.2d 817.

“As I see it, the Probate Court has no jurisdiction or authority to even entertain or consider the question of the validity or invalidity of any part of this assessment. This final assessment is as conclusive as a judgment of the circuit court and certainly an inferior court in any proceeding could not set it aside. As a matter of fact, I doubt very seriously if the Circuit Court has any jurisdiction at this late date.

“Although, as above stated, I have not had the opportunity to research this question as thoroughly as I intend to, it appears to me that the taxpayer's only remedy is found in Title 37, Section 729, Code of Alabama, 1940, as follows:

“ ‘Any person, or his agent, or the heir or personal representative of such person, who owns property subject to taxation in said municipality and who, through a mistake or error in the assessment or collection of taxes, has paid to the municipality through the county tax collector money that was not due from him for taxes, may file a petition with the council, board of commissioners, or other governing body of said municipality, asking that a warrant be drawn in his favor refunding to him the money paid and received by the municipality. The council, board of commissioners, or other governing body of said municipality shall examine into the facts and evidence offered by the petitioner in support of the allegations of his petition and if proper and full proof of the same be made,

the council, board of commissioners, or other governing body of said municipality must allow said claim to the amount of municipal taxes received, and must order the treasurer or acting treasurer of the municipality to pay the same.'

"In other words, the assessment should be paid under protest and then the petition filed for refund thereof.

"If I may do so, without appearing presumptuous, may I suggest that you and Mr. Simpson invoke the provisions of Title 51, Section 255, Code of Alabama 1940, and obtain a continuance of this case during which time you may seek the advice of the State Department of Revenue to which you, the Tax Assessor and Probate Judge are entitled under Title 51, Section 131(c), Code of Alabama 1940. Incidentally, I am sure the Department's Attorneys can promptly answer this question for you as the Supreme Court in its opinion in the above cited case refers to 'Methods of Judicial Review' promulgated by the legal division of the Department by 'Bulletin' dated May 31, 1961.

"In conclusion, let me state that in writing this letter it is not my intention to try to tell you how to run your office but simply to point out the position that the city may have to take at a later date in the event its rights are prejudiced by hasty action on the part of you, the Tax Assessor or Probate Judge. As stated above, each of you is entitled to representation by the Department of Revenue who made the assessment in question and I certainly think you should avail yourselves of it before proceeding further.

"Yours very truly,

"ARCHIE I. GRUBB

"AIG: ab"

Under the provisions of Title 51, Section 25, Code of Alabama 1940, Recompiled 1958, it is the duty and responsibility of the Department of Revenue to make a final determination of the value of the shares of stock of domestic corporations for the purpose of taxation. After such determination as to value has been made final, the Department of Revenue delivers the final assessment to the tax assessor and the taxes thereon shall be 'collected in the county wherein such corporation has its home or chief office in the State.' Section 25, *supra*. It should be pointed out that the final assessment made by the Department of Revenue is not for a fixed amount of tax due either the state, county or city but is a final determination of the value of the shares on which the county tax assessor and collector computes the actual amount of tax due the state, county and city (if any). The amount of tax due is determined by the tax assessor and collector applying the applicable

rate for state, county and city taxes to the value of the shares for taxation as fixed by the Department of Revenue.

From the Revenue Department's files in this matter, it appears that the facts are as follows: On or about October 24, 1963, it was learned by the State Department of Revenue that Ames Timber and Land Company, Inc., a domestic corporation, had made no return for nor paid share stock tax levied by the provisions of Title 51, Section 25, Code of Alabama 1940, Recompiled 1958, and administrative steps were begun to make assessments for the years 1959, 1960, 1961, 1962 and 1963. On October 30, 1963, preliminary assessments were entered by the Department of Revenue for each of said years and November 12, 1963, was set as the date for hearing any protest to these assessments. On November 1, 1963, Mr. Carroll H. Stough, Revenue Department agent who handles this type of tax, talked over long distance telephone with Mr. F. K. Taylor, Secretary, Ames Timber and Land Company, Inc., and on November 8, 1963, Mr. Stough received the balance sheets and operating statements of the corporation for the above years. Based on the information contained in the balance sheets and the operating statements, and following correspondence between Mr. Stough and Mr. Taylor relating to several items affecting the value of the shares, the amount of each preliminary assessment was reduced and the hearing date extended to December 9, 1963 "to allow time for further discussion if any is necessary." Following additional correspondence, where in an explanation was made by the Department of Revenue as to how the valuation was arrived at, the following letter from Mr. Taylor was received by the Ad Valorem Tax Division, Revenue Department, on December 9, 1963:

"Thank you very much for your letter of December 3rd, 1963 and the explanation was very clear. We now understand what you have done in making this valuation. Therefore, we are accepting the adjustments as made, and will await your advice on how payment should be rendered. In other words, should we compute the tax, or will a statement be rendered by your department."

On December 9, 1963, final assessments were entered for each of the years involved in accordance with the explanation and understanding as noted above. All of the statutory requirements necessary to make valid assessments were followed. No appeals from these final assessments were taken by the Ames Timber and Land Company, Inc., as are authorized by the provisions of Title 51, Sections 26 and 140, Code of Alabama 1940, Recompiled 1958, and the final assessments were delivered to the Tax Assessor of Barbour County for collection of the tax due based on the valuation of the shares as fixed in said final assessments.

Your inquiry contains seventeen questions, some of which are based on hypothetical situations. I believe, for the purposes of this opinion, that it is best to discuss the problem generally upon which future actions can be based depending upon the course of events.

First of all, it is my opinion that under the facts involved in this matter, the final assessments for the years 1959 through 1963 cannot be changed or reduced by the Department of Revenue, by the Probate Court of Barbour County or by the Circuit Court of Barbour County. In giving my opinion on this question I must refer to and take into consideration what the Supreme Court of Alabama has said with respect to final assessments made by the Department of Revenue and not appealed to the circuit court.

In the case of **State v. Woodroof**, 253 Ala. 620, 46 So. 2d 553, the Court said:

"The final assessment not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized by section 139 of the Constitution, and is conclusive as such. Being rendered on March 29, 1948, and no appeal having been taken in thirty days, section 140, supra, no attack can be made upon it except such as applies to an ordinary court judgment. It therefore conclusively fixed the amount of the tax claim as of March 29, 1948. *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 51 So.2d 280."

The case of **Fuqua v. Spry Burial Insurance Company**, 254 Ala. 189, 47 So.2d 817, seems to be directly in point. In this case the Department of Revenue made a preliminary assessment against the corporation for share stock tax, notified the corporation and set a date for hearing objection to the assessment. No objection was made, the assessment was made final, and no appeal was taken from the final assessment. Thereafter, the corporation filed a bill of complaint in the circuit court against the tax collector of Lauderdale County seeking to enjoin and restrain him from proceeding with the collection of the tax assessment against the corporation. The circuit court granted a temporary injunction and the case was appealed to the Supreme Court of Alabama. In reversing the circuit court, the Supreme Court said:

"It is a principle of taxation that, where the state has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its results, unless impeached for fraud or want of jurisdiction, or reversed and set aside by some tribunal having authority to review. . .

"No question is raised as to the authority and jurisdiction of the Department of Revenue to assess taxes upon corporate shares of stock, and since no appeal was taken from the final assessments in this case, appellee seeks to reopen the assessment on the ground of fraud.

"We think that the valuation and assessment of corporate shares of capital stock being judicial in nature, the same rules apply as to when, and under what circumstances, a court of equity will set aside judgments and decrees on the ground of fraud. That is to say, the assessment is impeachable only for actual fraud in the procurement or concoction of the assessment. And our cases are clearly to the effect that the fraud relied upon must be extrinsic. *Farrell v. Farrell*, 243 Ala. 389, 10 So. 2d 153, and cases cited. And it was said in *Adler v. Van Kirk Land and Construction Co.*, 114 Ala. 551, 562, 21 So. 490, 493, 62 Am. St. Rep. 133; 'The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not a fraud in the matter on which the decree was rendered.'

"The allegation of fraud is, in substance, that the State Department of Revenue, or parties in charge of making the assessments for the State of Alabama, failed to properly compute or determine, in accordance with the provisions of section 25, *supra*, the value of said shares of stock for tax purposes, and knowingly and fraudulently made said assessments, knowing that no capital stock tax should be assessed against complainant's stock; that said assessment was made for the sole purpose of fraudulently forcing the complainant to pay a tax which it or its stockholders did not owe; and because said assessment was fraudulently made and made with the intent to defraud complainant, it is illegal and void.

"Laying to one side the question as to whether the allegations of fraud are mere conclusions, it is clear enough that the fraud, if any, relied upon is intrinsic rather than extrinsic.

"It is also elementary that one who seeks relief from a judgment or decree of a court of competent jurisdiction must aver and prove that he himself was free from fault or negligence in suffering the judgment or decree to be entered. *Evans v. Whilhite, et al.*, 167 Ala. 589, 52 So. 845; *Wright v. Wright*, 230 Ala. 35, 159 So. 220; *Farrell v. Farrell*, *supra*." [Emphasis added]

See also the case of *Sparks v. Brock & Blevins, Inc.*, 274 Ala. 147, 145 So. 2d 844, wherein the Alabama Supreme Court laid down the rule as follows:

"The rule in our jurisdiction is that a final assessment of the Department of Revenue unappealed from is as conclusive as a judgment of a circuit court of Alabama, and may be impeached only by a direct proceeding not being subject to collateral attack. *State v. Woodroof*, 253 Ala. 620, 46 So. 2d 553; *State ex rel. Carmichael, Atty. Gen. v. Jones*, 252 Ala. 479, 41 So.2d 280. The right of appeal

is clearly statutory and must be exercised in the mode and within the prescribed time. *State v. Ide Cotton Mills*, 175 Ala. 539, 57 So. 481; *Ross Jewelers v. State*, 260 Ala. 682, 72 So. 2d 552, 43 A.L.R. 2d 851."

In view of the above statements and rulings by the Supreme Court of Alabama I can only conclude that, under the facts and circumstances as set out above, neither the Department of Revenue, the Probate Court or the Circuit Court of Barbour County has jurisdiction or legal authority to change the final determinations made by the Department of Revenue as to the value of the shares for taxation as reflected by the final assessments herein involved and that the Tax Collector of Barbour County should proceed to collect the amount of tax for the State and County based on the value as stated in the final assessments.

Title 37, Sections 701 and 730, Code of Alabama 1940, Recompiled 1958, provides as follows:

"§ 701. Tax Collector shall collect municipal taxes. — The tax collector of the counties in which such municipalities are situated shall collect all property taxes for such municipalities at the same time and in the same manner and under the same laws that state and county taxes are collected."

"§ 730. Laws now in force. — All laws now in force or hereafter enacted in regard to the collection of state and county taxes and procedure, with reference thereto, and the enforcement of collection shall apply to and be in force as to such municipal taxes, except as such laws are changed by or in conflict with the provisions of this article and the county tax collector shall collect or enforce the collection of such municipal taxes at the same time, in the same manner and way, and as a part of one and the same collection as the collection of state and county taxes and all procedure incident to or in any wise connected with the collection of state and county taxes shall be equally applicable to the collection of said municipal taxes and all such municipal taxes shall be collected in the same way and in the same proceedings as state and county taxes."

Assuming that the City of Eufaula has levied a tax the amount of which is to be determined by applying the city rate to the value of the shares fixed by the Department of Revenue under the provisions of Section 25, *supra*, the liability or non-liability for such municipal tax depends upon the location of the corporation's home or chief office in the State of Alabama during the years involved. From the facts stated in your inquiry and from the Revenue Department's records, the certificate of incorporation of the Ames Timber and Land Company, Inc., designates Eufaula as its principal office. Franchise tax returns filed by said corporation with the Revenue Department for the years 1957,

1958, 1959, 1960, 1961, 1962, and 1963 state that the corporation's principal place of business is Eufaula, Alabama, and that its agent for process is Mr. Archie Grubb, P. O. Box 342, Eufaula, Alabama. The determination of a corporation's "home or chief office in the State" is a question of fact. Based on the above recited facts, without more, it appears that the chief or principal office of Ames Timber and Land Company, Inc., was located in Eufaula, Alabama, during the years in question and that the city tax for these years is due. However, as stated above, this determination is one of fact. If the judge of probate decrees that the corporation's principal office was not in Eufaula during the years involved and that the city tax is not due, it is my opinion that, in view of the provisions of Title 37, Section 730, *supra*, an appeal may be taken on behalf of the city to the circuit court, in equity, of Barbour County in accordance with the provisions of Title 51, Section 272, Code of Alabama 1940, Recompiled 1958. Since this would be a problem of interest to the city only and since the tax collector is acting solely on behalf of the City of Eufaula, it is my opinion that the case should be handled by the legal staff of the city.

It must be remembered that the final assessments or final determinations as to the value of the shares for taxation made by the Department of Revenue were not final assessments of state, county or municipal tax as such. Insofar as the city is concerned, the final determinations of value of the shares are of use only if a city tax is in fact due on such value. Therefore, with respect to the city tax, in my judgment, the validity or invalidity of the final assessments is not at issue. The only question to be decided is whether or not a city tax is in fact due and this depends on whether or not the home or chief office of the corporation was in Eufaula, Alabama, during the years in question.

With respect to your first question, it is my opinion that, under the circumstances, the tax collector should proceed to collect the state and county tax due and refrain from collecting the city tax until there has been a final judicial determination as to whether or not a city tax is in fact due. Title 51, Sections 258 and 272, Code of Alabama 1940, Recompiled 1958.

In view of the above, I do not deem it necessary to answer each of the other specific questions set forth in your inquiry.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 21, 1964

Honorable A. R. Meadows
State Superintendent of Education
Montgomery 4, Alabama

Officers and Offices — Sheriffs — County Boards of Education

A member of a county board of education, though holding an office of profit, may also at the same time serve as a salaried deputy sheriff paid by the county, who is appointed by the sheriff and removable at his pleasure, without offending the provisions of Section 280 of the Constitution of Alabama 1901 or Title 41, Section 5(7), Code of Alabama 1940, Recompiled 1958, which prohibits the holding of two offices of profit under this State at one and the same time.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion under date of May 19, 1964, with enclosure to you from Honorable Lloyd G. McClenny, Superintendent of Education, Coosa County, under date of May 13, 1964, presents the following:

“Mr. H. E. McEwen, Coosa County Board member of Rockford, Alabama, accepted an appointment as Coosa County Deputy Sheriff on Monday, May 11, 1964. Mr. McEwen was elected by the people of Coosa County as a Board Member in the Democratic primary of May, 1962, and the ensuing General election of Nov. 1962. His compensation as a Board Member is set by Local Act Number 436 of Sept. 1957 (House Bill 997).

“A Coosa County Deputy Sheriff is paid from Coosa County Court of Commissioner’s funds.

“Please give us an official opinion on the following questions:

“1. Is it legal for Mr. McEwen to serve as County Board of Education member and Coosa County Deputy Sheriff at one and the same time?

“2. Will any remuneration paid Mr. McEwen by our Custodian of school funds be charged back to the Superintendent of Education, Custodian and or Board Members?

“3. Can Mr. McEwen hold both positions legally, by declining any pay as a Board member?”

I am of the opinion that the first inquiry should be answered in the affirmative. This answer obviates the necessity of answering the second and third inquiries.

This office has heretofore held that a member of a county board of education holds an office of profit under this State within the meaning of Section 280, Constitution of Alabama 1901 and Title 41, Section 5(7), Code of Alabama 1940, Recompiled 1958. — Quarterly Report of Attorney General, Volume 77, page 47; Quarterly Report of Attorney General, Volume 32, page 58.

In the opinion in Quarterly Report of Attorney General, Volume 77, page 47, *supra*, it was also held that the office of chief deputy sheriff was such an office of profit, and that one could not hold both the office of the county board of education and chief deputy sheriff at one and the same time.

This office in a recent opinion to Honorable Earl C. Morrison, Mayor, Town of Ohatchee, under date of January 24, 1964, Quarterly Report of Attorney General, Volume 114 (Ms.), held that a deputy sheriff does not hold an office of profit within the meaning of Section 280 of the Constitution of 1901, *supra*, or Title 41, Section 5, Code of Alabama 1940, *supra*. The holding was based on the Supreme Court decision in the cases of *Ward et al. v. State ex rel. Goldsmith*, 203 Ala. 306, 82 So. 662; and *Kemp et al. v. Wilson*, 17 Ala. App. 224, 84 So. 636. — See Letter to Mr. Paul Maddox, Rockford, Alabama dated March 8, 1950.

The above rulings in regard to a deputy sheriff not holding an office of profit dealt with situations wherein said deputy sheriff was paid by the sheriff himself and not out of county funds. However, I do not think the mere fact that a deputy sheriff is paid from county funds rather than by the sheriff himself would alter the conclusions therein reached. In the instant situation, as in most cases, the salaried deputy sheriff paid by the county is appointed by the sheriff and holds office at the pleasure of the sheriff (See Acts 1959, page 464). Such a deputy does not himself exercise sovereign powers of the State but merely acts as the alter ego of the sheriff under whom he serves, and in the performance of his duties the acts of the deputy sheriff are in effect the acts of his principal.—**Jefferson County v. Dockerty**, 33 Ala. App. 30, 30 So.2d 469; 249 Ala. 196, 30 So.2d 474; and **Mosley v. Kennedy**, 245 Ala. 448, 17 So.2d 536.

I am not unmindful of the dicta in the case of **Ward et al. v. State ex rel. Goldsmith**, *supra*, wherein it is intimated that perhaps a salaried deputy sheriff paid by a county might be considered to hold an office of profit within the meaning of Section 280, Constitution of Alabama 1901. I

do not think that such dicta has the effect of making it necessary for this office to reach a conclusion different from that above stated.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 2, 1964

Dr. Ira L. Myers
State Health Officer
Department of Public Health
C A P I T O L

Water — Health and Health Department — State Board of Health — Municipalities — Counties — Corporations — Statutes.

1. The furnishing of water for human consumption and for domestic uses is subject to supervision by the State Board of Health.

2. A statute (Section 25 of Act No. 461, Acts of 1963, page 996, approved September 6, 1963) purportedly exempting certain water authority corporations from governmental regulations and supervision should not be construed to repeal statutes requiring a State Board of Health permit to distribute water for human consumption and domestic use.

3. Neither municipal corporations nor water authorities may issue bonds or incur debt in aid of a water supply when no permit has been obtained for such facility from the State Board of Health.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 9, 1964 is as follows:

“Act No. 461, Regular Session, 1963, authorizes and makes provisions for the incorporation of Water Authorities which may construct and operate public water supplies. Title 22, Chapter 3, Sections 117-131 and 137-140, inclusive, of the Code of 1940, among other things, defines a public water supply and requires that the Alabama State Board of Health exercises supervision over such water supplies. It

appears to me that Section 25 and probably other sections of Act 461, Regular Session, 1963, conflict with the previously adopted law under which we have operated for many years. I refer specifically to the part of Section 25 which states:

“ ‘Each Authority incorporated hereunder and every system or facility thereof and all rates, fees and charges established thereby shall be exempt from supervision, review or regulation by any commission, board, bureau, department, agency, political subdivision, or official of the state, or of any authorizing subdivision, or of any county, city or town within the state.’

“It is necessary that the State Board of Health maintain supervision of all public water supplies; therefore, I would appreciate very much your studying this matter and giving me your opinion. Should there be conflict, please advise me what steps should be taken.

“Section 130 of Title 22, Chapter 3, Code of Alabama, states:

‘ **“Permit from State Board of Health to construct waterworks system.**—No person, firm, corporation, public utility, municipality or other body or institution shall hereafter construct any waterworks or waterworks system for supplying water for domestic purposes to the public, without having first obtained a permit from the State Board of Health as provided in this article and no municipal corporation shall be authorized to incur any debt or to issue bonds in aid of such water supply unless a permit shall first have been obtained from the State Board of Health approving the source of supply as set out in this article.’

“Would this section, with reference to incurring debt or issuing bonds, be applicable to a Water Authority established under Act 461, Regular Session, 1963?

“We have worked with the State Director of the Farmers Home Administration, Mr. Julian Brown, in the planning and construction of public water supplies. His agency has cooperated fully with us, and we are interested in his agency being in a position to finance construction of water systems which we can approve. Mr. Brown, on January 23, wrote to you regarding the validity of Act 461. Referring to his letter and the material he transmitted, your opinion to his questions would be helpful to me.”

In my opinion the State Board of Health has supervision and control over all water supplies and waterworks supplying water for human consumption and domestic uses in the State insofar as purity, potability, wholesomeness and physical quality of water is concerned. Title 22, Sec-

tion 117, et seq., Code of Alabama, Recompiled 1958. This includes water for human consumption and domestic uses proposed to be furnished by water authorities under the provisions of Act No. 461, supra.

Further, it is my opinion that Section 130 of Title 22, Code of Alabama 1940, prohibiting a municipal corporation from incurring debt or issuing bonds in aid of a water supply, unless a permit from the State Board of Health is first obtained approving the source of supply, is applicable to a city or town proposing to incur debts or to issue bonds in aid of a water supply regardless of whether or not said water supply is controlled or operated by a water authority under Act No. 461, Acts 1963, page 996, approved September 6, 1963.

A water authority created under Act No. 461, supra, is not a municipal corporation as that term is used in Title 22, Section 130, Code of Alabama 1940. Therefore, Section 130, supra, itself does not prohibit a water authority from incurring debt or issuing bonds in aid of a water supply, but such authority is required to obtain a permit from the State Board of Health, as required by Section 130, before construction of waterworks or waterworks system for supplying water for domestic purposes, and would not be authorized to incur debt or issue bonds unless such permit is obtained.

The State Board of Health has supervision and control over all water supplies and waterworks in the State insofar as purity, potability, wholesomeness and physical quality of the water is concerned. Title 22, Section 117, et seq., Code of Alabama, Recompiled 1958.

Water intended for human consumption or domestic use is required to be periodically tested by the Board of Health. Title 22, Sections 118, 119, supra. Those proposing to furnish water for human consumption or domestic uses are required to petition the Board of Health showing in detail the source of water supply, the manner of storage and distribution, and other detailed information to insure that the water proposed to be distributed will be pure and not a danger to health. The Board of Health is authorized to investigate the proposed water system, hold a hearing and determine whether or not such water may constitute a menace or danger to health or lives of human beings and whether the plant is sufficient to product and deliver wholesome and pure water. Title 22, Section 125, Code of Alabama, Recompiled 1958.

The Board of Health is authorized to grant or refuse a permit depending upon its investigations and the healthfulness of the water and the sufficiency of the waterworks system. All persons, corporations, or municipalities are prohibited from distributing water to the public without a permit and further municipalities are prohibited from incurring any debt or to issue any bonds in aid of a water supply unless a permit had been issued. Title 22, Section 130, Code of Alabama, Recompiled 1958.

Statutory remedies by injunction are provided to enjoin the distribution of water for human consumption or domestic uses without a permit. Title 22, Section 131, Code of Alabama, Recompiled 1958.

Act No. 461 is broad and sweeping in scope. This office is not here undertaking to pass upon the constitutionality of the act. Briefly, the act authorizes three or more persons who are property owners and electors to file a certificate and application with the governing body of any city or town. Thereupon the municipal governing body may by resolution (without any notice or publication) approve the formation of the corporation or water authority. No test or criterion is established. Corporation offices may be anywhere in the State and any number of counties may be designated within which the corporation may operate.

A board of directors is provided for, one election by the city or town governing body which authorized the incorporation, and one or two members are elected by the county governing body, depending on the number of counties served by the authority. Directors receive expenses and may receive per diem. Provision is made for officers and employees of the board.

The authority has broad powers, general and specific, outlined in Section 8 of the act, including the power to eminent domain, the power to furnish water and fire protection in counties and cities; to issue bonds payable from revenues; to fix rates without supervision except for a provision that the board shall make its rates, fees and charges "just and equitable." Section 9, Act No. 461, *supra*.

Counties and cities and towns are authorized to lend or donate funds to the corporation or authority, to transfer taxes available for furnishing water to the corporation and to:

" . . . do any and all things, whether or not specifically authorized in this section, not otherwise prohibited by law, that are necessary and convenient to aid and cooperate with the authority in the planning, undertaking, construction, or operation of water systems and fire protection facilities."

By Section 11 of said act, directors and the authority are immune from liability in connection with fire protection facilities.

By Section 12, bonds may be issued by the authority, payable from a pledge of the revenues of the authority. Interest rates may be fixed by the board apparently without limitation. No hearing and no consent of the Department of Finance is necessary.

Proceeds of the bonds may be used not only for the acquisition of a

water system but for all expenses connected therewith, including landscaping, roads, sidewalks, and parking places.

The bonds and income therefrom are exempt from State taxes, and all property and income of the authority are exempt from taxation and licenses.

Counties and cities are authorized to invest in bonds or notes of the authority.

The authority is empowered to sell revenue notes up to twenty-five percent of gross annual revenues, bearing interest rates fixed by the board.

The corporation is authorized to use public roads' rights of way of the State and county without approval of any agency subject only to Section 220 of the Constitution.

The authority is exempted from laws requiring advertising and awarding construction contracts and purchases.

Provision is made by the act that when all notes and bonds have been paid in full, the property of the corporation may be distributed according to a plan approved by the board of directors and by the city governing body which authorized the incorporation of the authority.

Section 25 of Act No. 461, supra, provides in part as follows:

"Each authority incorporated hereunder and every system or facility thereof and all rates, fees and charges established thereby shall be exempt from supervision, review or regulation by any commission, board, bureau, department, agency, political subdivision, or official of the state, or of any authorizing subdivision, or of any county, city or town within the state."

Literally construing this provision it may be contended that water authorities organized according to Act No. 461, supra, and water distributed by such agencies, and systems and facilities so operated are, by reason of Section 25, exempt from regulation, supervision or review by the State Board of Health. I am of the view, however, that Act No. 461, and particularly Section 25 thereof, must not be so construed.

Clearly Act No. 461 was intended by the Legislature to afford a means of organizing a quasi public corporation, the chief concern of which is to furnish water to the public for human consumption and domestic uses. No provision is made in the act for the inspection and approval of the source of supply or the storage, treatment or distribution system from a public

health standpoint. The absolute necessity of inspecting and approving source, storage and distribution of a public water supply is well known to the Legislature, and it is impossible to believe that the Legislature intended to allow any person, corporation or agency to distribute water to the public for human consumption and domestic use without prior and continuing inspection by a reliable health agency. To construe Section 25, *supra*, as exempting water authorities from applying for and obtaining a permit from the State Board of Health before distributing water would require the assumption that the Legislature abandoned its duty to the public to preserve the public health and intended to make it possible for unclean, wholesome, polluted water to be distributed for human consumption and domestic use. The law does not favor the repeal of statutes by implication and it is my opinion that Section 25, *supra*, does not repeal those provisions of law (Title 22, Section 117, et seq.) requiring a permit from the State Board of Health whenever it is proposed to furnish or supply water for human consumption or domestic use.

It is my opinion, therefore, that water authorities organized under the provisions of Act No. 461 must apply for and obtain a permit from the State Board of Health.

Since a permit is required when a water authority proposes to distribute water for human consumption and domestic use, it is my view that Title 22, Section 130, Code of Alabama, Recompiled 1958, prohibits a city or town from incurring a debt or issuing its bonds in aid of a water supply unless such permit has been obtained. Section 130, *supra*, is one of the methods of enforcing the requirement of obtaining a permit from the State Board of Health. Parts of Act No. 461, *supra*, authorize cities and towns to lend or donate money to the authority; also cities and towns may "provide that all or a portion of the taxes or funds available or to become available to it, or required by law to be used by it for furnishing water or fire protection shall be transferred or paid directly to the authority as such funds become available to it." Such provisions should be construed to apply only to water authorities which have obtained a valid permit from the State Board of Health. A water authority not having a valid permit and distributing water would be operating illegally and Act No. 461 should not be construed to authorize municipal corporations to aid in the commission of an illegal act.

In my opinion the same reasoning would apply to a water authority proposing to incur debt or issue bonds in aid of a water supply. That is to say, a water authority organized under Act No. 461 is not, in my opinion, authorized to incur a debt or issue bonds in aid of a water supply unless a permit is issued by the State Board of Health. Title 22, Section 130, does not by its terms expressly prohibit the incurring of debt or issuing of bonds except in the case of a municipal corporation. In my opinion, a water authority is not in the strict sense a municipal corporation as that term is used in Section 130, *supra*. That term as used in Section 130, *supra*, in my opinion, means an incorporated city or town. Never-

theless, a water authority is a quasi public corporation and as such could not be allowed to participate or aid in an illegal act, namely, the distribution of water for human consumption and domestic use without a permit from the State Board of Health, by borrowing funds to be used for distributing such water.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 5, 1964

Mrs. Louise S. Champion
Tax Assessor, Montgomery County
Courthouse
Montgomery 4, Alabama

Ad valorem Taxes — Assessments.

Property should be assessed for ad valorem tax for each year against the party owning such property on October 1, the tax or law day.

Opinion by Assistant Attorney General Livingston.

Dear Madam:

Your request for an official opinion dated June 2, 1964, is as follows:

"Re: Hotel & Lot 5, 73½ ft. of 7
Block 13 East Alabama
Assessed Value: \$270,000.00
Personal Property: \$15,000.00

"I would appreciate your official opinion regarding the problem encountered by this office, which is stated below.

"The Montgomery Hotel Company, a corporation, returned the above captioned property for assessment on December 6, 1962, for the tax year 1963. This assessment was made by Mr. W. H. Crane, Auditor, for the same property in the same values as assessed in previous years.

"The property in question was sold to the Alabama Farm Bureau Mutual Casualty Insurance Company, Inc. on November 30, 1962.

On December 28, 1962 Mr. B. P. Richards transferred the property to Alabama Farm Bureau Mutual Insurance Casualty Company, Inc. by Deed recorded in the Office of the Judge of Probate in Deed Book 531 page 449, dated November 30, 1962, and requested a reduction. This reduction was granted by the Board of Equalization.

"I would appreciate your advising which of the above assessments is the valid assessment, also what value should remain on the assessment rolls, as it involves the same property."

From the facts stated in your inquiry, it appears that the property in question was owned by the Montgomery Hotel Company on October 1, 1962 and that it was returned for assessment for the tax year October 1, 1962-September 30, 1963, by the Montgomery Hotel Company on December 6, 1962. Additional information furnished by your office over the telephone is to the effect that the assessment of this property was changed in your office to the Alabama Farm Bureau Mutual Casualty Company, Inc., on December 28, 1962. The records of the Montgomery County Board of Equalization reflect that the assessment against the Montgomery Hotel Company, wherein the value of the property assessed was set at \$285,000, was stamped approved by the Montgomery County Board of Equalization on April 30, 1963 over the signature of N. Trotter, Chairman, and that the assessment against the Alabama Farm Bureau Mutual Casualty Company, Inc., wherein the value of the property assessed was set at \$165,000, was stamped approved by the Montgomery County Board of Equalization on April 30, 1963, over the signature of N. Trotter, Chairman.

Since the property in question was owned on October 1, 1962 by the Montgomery Hotel Company and was due to be assessed against the Montgomery Hotel Company, it is my opinion that there is and was no legal authority to change the assessment of this property to the Alabama Farm Bureau Mutual Casualty Company, Inc., for the tax year October 1, 1962-September 30, 1963. Property should be assessed for ad valorem tax for each tax year against the party owning such property on October 1, the tax or law day. Title 51, sections 39 and 884, Code of Alabama 1940, Recompiled 1958.

After referring to the provisions of Title 51, section 884, Code of Alabama 1940, Recompiled 1958, the Supreme Court of the United States in the case of **United States v. State of Alabama**, 313 U. S. 274, 61 S. Ct. 1011, stated:

"There is no question however, as the Government concedes, that the state statute purports to impose a lien as of October 1, 1936, for

the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. 'It follows the land in the hands of the vendee, all persons being chargeable with a knowledge of its existence'. *Driggers v. Cassady*, 71 Ala. 529, 534. See, also, *Swann v. State*, 77 Ala. 545; *State v. Alabama Educational Foundation*, 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the daily specified.

"We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the State, is to be deemed effective from the moment the tax day began. See *Beck v. Johnson*, 235 Ala. 323, 324, 179 So. 225."

Therefore, it is my opinion that the property was properly and legally assessed for ad valorem tax for the tax year October 1, 1962-September 30, 1963 against the Montgomery Hotel Company at a value of \$285,000 and that the assessment of this same property against the Alabama Farm Bureau Mutual Casualty Insurance Company, Inc., for said tax year was illegal and of no force and effect and should be marked void and stricken from your records.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 9, 1964

Honorable Virgil Nolen Price, Superintendent
Tallapoosa County Schools
Dadeville, Alabama

Officers and Offices — County Boards of Education — County
Boards of Equalization

One may not at the same time hold the offices of a member of the county board of education and a member of the county

board of equalization. Such would be in violation of Section 280 of the Constitution of Alabama 1901 or Title 41, Section 5(7), Code of Alabama 1940, Recompiled 1958, and Title 51, Section 92, Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of June 1, 1964 is as follows:

"I would like an opinion on the following:

"Can a person serve as a member of the Tallapoosa County Board of Education as an elected member and be appointed as a member of the Tallapoosa County Board of Equalization."

I am of the opinion that your inquiry should be answered in the negative.

Both Section 280 of the Constitution of Alabama 1901 and Title 41, Section 5(7), Code of Alabama 1940 prohibit the holding of two offices of profit under this State by the same person at one and the same time (with certain exceptions not here material).

Moreover, Title 51, Section 92, Code of Alabama 1940, Recompiled 1958, provides as follows:

"No member of any county board of equalization shall hold employment or office of profit with the United States, the state of Alabama, any county or other political subdivision of said state, or with any board, department or other agency of the United States, of the state of Alabama, of any county or other political subdivision of said state or with any county school board or with any municipality, while holding office as a member of said board."

This office has heretofore held that a member of a county board of education holds an office of profit under this State within the meaning of Section 280, Constitution of Alabama 1901 and Title 41, Section 5(7), Code of Alabama 1940, Recompiled 1958. — Opinion of Attorney General to Honorable A. R. Meadows, State Superintendent of Education, dated May 21, 1964 (Ms.); Quarterly Report of Attorney General, Volume 77, page 47; Quarterly Report of Attorney General, Volume 32, page 58.

It has been likewise held by this office that a member of a county

board of equalization holds such an office of profit. — Quarterly Report of Attorney General, Volume 82, page 20.

In view of the foregoing, it follows that a person may not at one and the same time hold the offices of a member of the county board of education and a member of the county board of equalization.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 16, 1964

Honorable Conrad M. Fowler
Probate Judge, Shelby County
Columbiana, Alabama

Counties — Schools — Alabama Trade School and Junior College
Authority Act

A county is not authorized to appropriate monies to be used for the purpose of assisting in the purchase of land in another county upon which a new vocational trade school is to be established. However, an appropriation by a county may legally be made for the purpose of supporting an existing vocational trade school in another county to which the residents of the appropriating county are enrolled or entitled to be enrolled as students.

Opinion by Assistant Attorney General Screws

Dear Sir:

Your request for an official opinion bearing date of May 21, 1964 is as follows:

“The Shelby County Board of Revenue and Control wishes to be advised whether it may legally make a contribution to the City of Childersburg, Talladega County, Alabama, to be used for the purpose of assisting in the purchase of a tract of land upon which is to be situated one of the new trade schools to be established by the State Board of Education.

“It is reasonable to expect that this school, when in operation, will provide training to a goodly number of citizens from Shelby County. There is no trade school in Shelby County. This facility will be of

continuing benefit to a number of boys and girls of this county as well as providing facilities to train people for the ever growing number of industries within our county."

I am of the opinion that your inquiry should be answered in the negative.

In a letter of this office to Honorable W. W. Weatherford, Judge of Probate and Chairman, Board of Revenue, Franklin County, dated June 13, 1961, it was held that a county could not legally appropriate money to be used towards the construction and equipping of a building at a trade school located in another county. In said letter it was observed:

"In a letter of this office addressed to Hon. W. H. Suddath, Clerk, Board of Revenue, Montgomery County, dated December 18, 1959, it was held that Montgomery County was authorized to contribute to the purchase of certain land in the county of Montgomery, to be conveyed to the State of Alabama for the erection of a vocational trade school, which institution is provided for by Act No. 673, General Acts 1947, page 514 and further by Act No. 126, Second Special Session 1959, page 369. This conclusion was based on the combined authority set forth in Title 52, Section 207, as amended by Act No. 35, Second Extra Session 1959, page 196 and Title 52, Sections 381-398, Code of Alabama 1940, together with the trend of liberalization in the opinions of the Attorney General authorizing the expenditure of county funds for educational purposes.

"Title 52, Section 207, as amended, *supra*, authorizes county governing bodies to appropriate monies out of its general fund for the construction, operation, maintenance and support of new or existing public schools within said county. It will be noted that expenditure is limited to construction, etc., **within said county**.

"Title 52, Sections 381-398, Code of Alabama 1940, *supra*, pertain to vocational education and provides for contributions by counties for such education under the Smith-Hughes Act in vocational high schools, either county or regional.

"I find no authority for county contributions in Act No. 673, General Acts 1947, page 514, *supra* (Title 52, Sections 451(1) — (7), Code of Alabama 1958, Recompiled), which provides for regional vocational and trade schools under the supervision of the State Board of Education.

"The conclusion reached in the letter to W. H. Suddath, *supra*, should be limited to the facts therein set forth in view of the citations of authority upon which said conclusion rests. Said opinion should not

be extended to the construction and maintenance of a facility without the county which makes such an appropriation."

Since the date of the letter to Judge Weatherford, the Legislature enacted Act No. 179, approved September 15, 1961, Acts of Alabama 1961, page 2153 (Title 52, Section 451 (9), 1953 Cumulative Pocket Part, Code of Alabama 1940, Recompiled 1958), which provides as follows:

"Section 1. The court of county commissioners, board of revenue or other like governing body of any county in the state may make appropriations of county funds to support any vocational trade school or similar institution of this state in which residents of the county or dependents of such residents are enrolled as students or are entitled to be so enrolled.

"Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

In my opinion this act does not authorize an appropriation of county funds for the purchase of land in another county for a vocational trade school. I think that the words "to support any vocational trade school, etc." apply to only vocational trade schools already in existence. Said act does not change the conclusions reached in the letter to Judge Weatherford in regard to a county not being authorized to appropriate its funds to be used towards (1) the purchase of land in another county from that making the appropriation, and (2) the construction of a trade school thereon. The proviso "to support any vocational trade school, etc." might well be construed to include the maintenance of an existing trade school in another county, but that question will be decided when presented.

There is nothing in Act No. 93, approved May 3, 1963, Acts of Alabama 1963, page 259 (Title 52, Section 509 (78-94), 1963 Cumulative Pocket Part, Code of Alabama 1940, Recompiled 1958), known as the "Alabama Trade School and Junior College Authority Act," nor any other statute that I am able to find, which authorizes such an appropriation by a county as the one under consideration.

In view of the above, it follows that your County Board of Revenue and Control may not legally make a contribution for the purpose of assisting in the purchase of a tract of land in another county upon which a new trade school is to be established by the State Board of Education.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 16, 1964

Honorable Forrest L. Adams
Solicitor, Twentieth Judicial Circuit
Dothan, Alabama

Gaming and Lotteries — Criminal Law

Sales promotion plan wherein the holder of a card, which is given to him in several ways from cards distributed freely to the public without any expenditure on his part whatsoever, inserts said card in a machine which determines whether he wins a prize or not by the flashing of a light, ringing of a bell or sounding of a buzzer, or having no reaction at all, does not constitute a lottery within the purview of Title 14, Section 275, et seq., Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of June 3, 1964 is as follows:

"It has come to my attention that some business establishments in this area might be about to engage in a sales promotion plan which might violate the laws of this State.

"The promotion plan is a 'give away' of prizes, money or other things of value and is directed to the entire public within the trade area of the businesses that purchase the service. The basic nature of the plan is as follows:

"It is a game, played by one person at a time and consists of any number of pre-punched cards and an electric machine or device designed with a slot that will admit one of these cards at a time. When the card is inserted into the slot, depending on the way the card is punched, the machine will flash a light, ring a bell or sound a buzzer or have no reaction at all. The holder of the card, depending on the type of reaction, is entitled to one of three prizes or no prize at all. The prizes are pre-arranged and advertised accordingly.

"In order to obtain and use the cards, a person buys nothing, pays nothing, and does nothing, except: a. ask for a card at the particular store presenting the promotion or anywhere the cards are available, or b. accepts a card without asking for it and, c. goes into the store where there is a machine and, d. inserts the card into the machine and, e. does whatever is necessary to call his

winning to the attention of the management in the event of winning and collects the prize.

"There is a restriction whereby a person can obtain only one card at any one time and cannot insert cards into the machine successively. This does not prevent the same person playing the game more than once.

"The purchaser of this service pays for it on a basis of the length of time the promotion is to run, and the number of cards and machines required. The purchaser determines the amount of money he wishes to give away. He then divides this amount into the three prize denominations that he desires. A card is then punched to correspond with each prize that is to be awarded. These prize-winning cards are then mixed with any number of other cards and all cards are distributed freely to the public. The plan is then advertised by handing out the cards, in newspapers, on radio or television, etc.

"Under the foregoing statement of facts, I request your official opinion as to whether a promotion plan such as this would be in violation of Section 275, et seq, Title 14, Code of Alabama 1940."

I am of the opinion that, under the facts stated, your inquiry should be answered in the negative.

The courts of this state have defined a "lottery" or scheme in the nature of a lottery as a plan in which a prize is set up and awarded by chance for the right to participate in which a consideration is paid. A lottery has three elements: (1) a prize (2) awarded by chance (3) for a consideration.—**Grimes v. State**, 28 Ala. App. 4, 178 So. 69. See also **Grimes v. State**, 235 Ala. 192, 178 So. 73; Quarterly Report of Attorney General, Volume 49, page 30.

Under the facts presented, there is no question of the existence of the element of (1) a prize, and (2) award being made by chance. As to (3) for a consideration, a very questionable situation is presented. The holder of the card, which is inserted in the machine, obtains the same gratuitously in one of several ways, pays nothing therefor and has to buy nothing to receive the same. All he has to do is insert the card in one of the machines placed in one of the stores which engages in the promotion plan. In other words, all he has to do is to go to the store, so to speak, where he may or may not make purchases. This, in my judgment, does not constitute the element of (3) for a consideration sufficient to label the operation a lottery.—**Clark v. State**, 262 Ala. 462, 82 So.2d 312; **Clark v. State**, 38 Ala. app. 78, 80 So.2d 308; Quarterly Report of Attorney General, Volume 91, page 23; Letters to Honorable Ianchard McLeod, Solicitor, Fourth Judicial Circuit, dated December 5,

1961, and Honorable William F. Thetford, Solicitor, Thirteenth Judicial Circuit, dated June 26, 1959; cf. Opinion of Attorney General to you dated May 14, 1964 (Ms.).

The foregoing is merely an expression of my opinion in regard to the facts presented. It must be borne in mind that the ultimate determination of the question involved turns upon the facts in each situation. Such determination is one that falls within the province of the court or jury when presented in a proper forum. It is not a matter upon which this office may conclusively decide—Quarterly Report of Attorney General, Volume 91, pages 23 and 37.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 17, 1964

Honorable J. Gilmer Blackburn
President, Board of Commissioners
City of Decatur
Decatur, Alabama

Honorable J. C. Howell
Chairman, Housing Authority of the
City of Decatur
Decatur, Alabama

Housing Authority — Municipalities.

Power of a municipal housing authority to purchase property to be used as a housing project for persons of low income.

Opinion by Assistant Attorney General Gish.

Dear Sirs:

Your request for an official opinion, dated June 2, 1964, is as follows:

“Housing Authority of the City of Decatur, Alabama, a Municipal Housing Authority was created about September 1, 1945, under Chapter 22 of Title 25, Code of Alabama, 1940, and has since that time actively engaged in the acquisition of lands and the construction and rental of low-rent housing.

“Several years ago, a corporate developer acquired lands in the

western section of Decatur and developed Westlawn Heights, constructing about eighty-nine houses for middle income families under section 221 of the Federal Housing Administration.

"The financing for this development was through the Federal National Mortgage Association. Default was made, the mortgage foreclosed and the properties purchased by the Federal Housing Administration Commissioner at the Foreclosure sales.

"The Federal Housing Administration Commissioner has been unable to sell the houses; they are mostly vacant, are deteriorating from non-occupancy and vandalism, and could be of use through the Local Housing Authority and its management for families of middle income or low income who could pay reasonable rentals in keeping with the purchase price to our authority, but would probably be for rental lower than the anticipated rental for said properties when constructed.

"The City of Decatur is in accord with Housing Authority of the City of Decatur, Alabama purchasing these houses for approximately \$347,700.00, and to finance the same by giving a mortgage to Federal National Mortgage Association or F. H. A. but before doing so, we are required to furnish an opinion from the Attorney General of the State of Alabama on the following:

"1. Does Housing Authority of the City of Decatur, Alabama, have the legal capacity to own, operate and give a binding first mortgage to Federal National Mortgage association and/or the Federal Housing Administration for the acquisition, financing and purchase of the sixty-one houses and lots now owned by the Federal Housing Administration Commissioner which are a part of the above described development.

"2. In your opinion, do the Housing Authority laws of Alabama in anywise limit or prevent a local Housing Authority from purchasing, owning, operating, selling or mortgaging real property originally developed for middle income families under section 221 of the Federal Housing Administration.

"3. Is there any authority for or prohibition under the laws of Alabama against Housing Authority of the City of Decatur, Alabama, owning, operating or giving a binding first mortgage on real property to be acquired for use by it for families not eligible for public low-rent housing but who are not financially able to rent other available standard houses.

"Your immediate personal consideration of this request and your written opinion covering the above inquiries is respectfully sought

to enable the Housing Authority of the City of Decatur, Alabama, to make a final determination regarding its purchase, financing and operation of the sixty-one houses and lots in Westlawn Heights.”

The questions presented have not heretofore been considered either by the appellate courts of this State or by this office.

The Housing Authority of the City of Decatur was created under and is controlled by Title 25, Chapter 2, Code of Alabama 1940, Recompiled 1958.

Municipal housing authorities are organized under Chapter 2, *supra*, for the purpose of providing a better quality of homes for citizens of moderate means and thereby improving living conditions and eradicating slums. **Brammer et al v. Housing Authority of Birmingham District et al**, 239 Ala. 280, 195 So. 256.

Title 25, Section 12, Code of Alabama 1940, Recompiled 1958, which enumerates the specific powers of municipal housing authorities, is sufficiently broad to empower such housing authorities to purchase a housing project from a governmental agency where such project will be used to eradicate slum conditions and provide safe and sanitary homes for persons of low income.

Title 25, Section 6, Code of Alabama 1940, Recompiled 1958, reads in part as follows:

“ . . . ‘Persons of low income’ shall be persons receiving less than the income determined by the authority as the amount persons must receive to enable them to pay the rent necessary to secure, safe, sanitary and uncongested dwelling accommodations (other than dwelling accommodations provided by the authority or any cities) within the boundaries of the authority. Such determination by the authority from time to time shall be binding and conclusive for all purposes hereunder. . . ”

Therefore, if the Housing Authority of the City of Decatur determines that the property to which your request refers can be used as a housing project for “persons of low income” as defined by Section 6, *supra*, I am of the opinion that your questions should be answered as follows:

1. Your first question is answered in the affirmative.
2. Your second question is answered in the negative.

3. In answer to your third question you are advised that the Housing Authority of the City of Decatur has no power to provide a housing project for families who cannot be classified as persons of low income.

As indicated hereinabove, I am further of the opinion that the Housing Authority of the City of Decatur may not purchase the property to which your request refers unless said property is to be used as a housing project for persons of low income.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 24, 1964

Hon. Robert M. Clecker
Superintendent of Banks
State Banking Department
C A P I T O L

Banks & Banking — Corporations.

1. State Banks may purchase all of the stock of a separate corporation.
2. Continued existence of such corporation discussed.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of June 5, 1964, is as follows:

"We have a bank under our supervision that has recently, through its board of directors, organized a separate building corporation for the purpose of erecting and leasing to the bank a building to be occupied solely by the bank. At the time the building corporation was organized, the entire amount of the stock was issued to three bank officers who are also serving as officers of the corporation. A short period of time after the corporation was organized, the entire amount of stock of the building corporation was sold to the bank.

"Request is made that you render an opinion on the legality of the above described action. We are principally concerned as to whether or not the corporation is now a legally bona fide corporation since all the stock has been sold by the stockholders of the building corporation to the bank and, also, whether or not a State-chartered bank can own all of the stock of a separate corporation."

The question of whether a bank may own stock in a corporation was answered in the affirmative in Biennial Report of Attorney General, 1918-20, page 245, wherein the question was presented as to whether a bank could subscribe to stock of a corporation engaged in whole or in part in the cotton export business.

Title 5, Section 118, Code of Alabama 1940, sets out, among other powers of banks, the right to purchase or sell stocks and bonds. This was the basis of the above opinion. It follows that if a bank may purchase some stock there is nothing to preclude said bank from purchasing all the stock of a company at least in the absence of statutory or other inhibition against such arrangement as tending to create a monopoly or substantially to lessen competition.

Unless the certificate of incorporation or by-laws requires that directors be stockholders the building corporation could continue as a bona fide corporation even though the bank now owns all the stock. See Title 10, Section 21 (24), Code of Alabama 1940, as amended.

My answer to each of your questions is in the affirmative.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 25, 1964

Hon. Ralph W. Roberts
State Registrar
Bureau of Vital Statistics
Department of Health
C A P I T O L

Health and Health Department — Birth Certificates —
Adoptions — Opinions Overruled, Modified or Dis-
tinguished.

1. Opinion of Attorney General, Quarterly Report of
Attorney General, April-June 1951, Vol. 63, page 82,
modified by **Doby v. Carroll**, 274 Ala. 273, 147 So. 2d
803, decided December 20, 1962.

2. Although an adult may not be adopted under Ala-
bama statutes, the Register of the Bureau of Vital
Statistics, should perform his duties prescribed by
Title 27, Section 4, Code of Alabama 1940, upon re-

ceiving a final order of adoption, by preparing a new record of birth and sealing the original birth certificate.

Opinion by Assistant Attorney General Stapp.

Dear Sir:

Your request for an official opinion bearing date of May 29, 1964 is, in substance, as follows:

For many years the Bureau of Vital Statistics of the Department of Health, under the authority of Title 27, Section 4, Code of Alabama 1940, as amended by Act No. 294, Acts of Alabama 1961, Extra Session, page 2351, approved September 15, 1961, has prepared revised certificates of birth and sealed the original upon receipt of a final order of adoption. This has been done in respect to birth certificates in the custody of the Alabama Bureau of Vital Statistics, both in cases where the adoption decree is from an Alabama court or the court of another state.

In view of the decision of the Alabama Supreme Court in the case of *Doby v. Carroll*, 274 Ala. 273, 147 So. 2d 803, decided December 20, 1962, holding that the Alabama adoption statutes do not authorize the adoption of an adult person, what should the Bureau of Vital Statistics do in connection with cases where Alabama courts have granted final adoption decrees where the person adopted was an adult and where courts of other states have granted final decrees of adoption of an adult and the birth certificate is in the custody of the Alabama Bureau of Vital Statistics?

You have submitted to this office papers and correspondence illustrative of the adoption of an adult in Louisiana, whose birth certificate is registered in Alabama.

Your duties are provided for in Title 27, Section 4, Code of Alabama, as amended, *supra*, which states in part as follows:

"Copies of all reports of adoptions shall be mailed to the registrar of vital statistics of the department of health. Upon receipt of copy of any final order of adoption the state registrar of vital statistics shall cause to be made a new record of the birth in the new name, and with the name or names of the adopting parent or parents. He shall then cause to be sealed and filed the original certificate of birth with the decree of the court and such sealed package shall only be opened upon the demand of said child or adopting parents or by the order of a court of record."

In 1951 the Attorney General observed, parenthetically, that adult

children may be adopted (Quarterly Report of Attorney General, April-June 1951, Vol. 63, page 82). This opinion, of course, has no effect since the ruling in **Doby v. Carroll**, *supra*.

As the Registrar of Vital Statistics of the Department of Health, you are given certain duties with respect to the issuance of new records of birth upon receipt of final copies of orders of adoption. Your duties are set out in Title 27, Section 4, *supra*.

In my opinion, it is not the duty of the Registrar of the Bureau of Vital Statistics to decide whether an order issued by a probate court, or other court, of the State of Alabama with respect to the adoption of an adult is void or valid. Such decision is of a judicial nature and not ministerial. It is my opinion that upon receipt of a final order of adoption, the Registrar of the Bureau of Vital Statistics should perform his duty as outlined by the statute, regardless of whether or not it may appear that the person adopted is an adult. Those who would challenge such an adoption have adequate means of doing so.

You have asked what action you should take with respect to adoption decrees originating in the courts of other states pertaining to persons born in Alabama. I understand that this is a service you provide as a matter of reciprocity and not one which is required by you by any particular statute. The Alabama decision, **Doby v. Carroll**, *supra*, applies only to Alabama cases. Other states have their own statutory requirements concerning adoption of minors and adults. It appears that there is nothing in Title 27, Section 4, Code of Alabama 1940, nor in the general statutes, prescribing the duties and responsibilities of the State Registrar of Vital Statistics requiring you to interpret the legal effect of court decrees. The responsibility for the judicial effect of these decrees is not that of your office. The responsibilities of your office are those of procuring faithful registration as directed by statute.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 26, 1964

Honorable Fred R. Ramsey, Superintendent
Marengo County Board of Education
Linden, Alabama

Schools — County Board of Education — Busses — Torts.

1. Local school boards must determine if the contemplated use of school busses for civic recreational or educational purposes

meets the test to the effect that the use for the transportation of pupils must be in furtherance of an approved course of study, prescribed and authorized by the State Board of Education or in furtherance of an approved educational program.

2. Generally, County Boards of Education are not liable in tort for the acts of its servants or agents. The liability resulting from school bus accidents would depend upon the facts of each particular case.

3. Act No. 533, Acts of Alabama 1959, page 1311, authorizing the use of school busses for certain purposes by any farm demonstration or farm life club, does not authorize such uses by other clubs or organizations.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an opinion of this office under date of June 18, 1964 is as follows:

"Please give me your opinion on the following:

"1. May county-owned school busses be used in the summer months for civic, recreational, or educational purposes?

"2. If so, who would be liable for accidents or personal injuries that may arise concerning these school busses?

"3. Does Act No. 533 (H. 1086 — Grant, Daniel) which was approved November 19, 1959 pertain to any group other than **farm** groups? For example, could a scout group use school busses under the same conditions?"

The proper use of county owned school buses has been before various attorneys general many times.

In an opinion of this office dated February 1, 1961 and reported in Quarterly Report of Attorney General, Volume 102, page 11, this office made the specific recommendation "that their use for proper purposes be left to the reasonable judgment and discretion of the city and county boards of education or their use defined and permitted by proper legislation."

The primary purpose for school busses is the transportation of pupils to and from consolidated schools within the county. The use for

other purposes has been approved by this office where the use is in furtherance of an approved course of study prescribed and recognized by the State Board of Education, or in furtherance of an authorized educational program. Quarterly Report of Attorney General, Volume 78, page 27. It is now my opinion that whether or not the use is within the above rule is not for this office to determine but for the local boards themselves in the exercise of the power vested in them.

Only recently, March 19, 1964, the Supreme Court of Alabama in **Conecuh County Board of Education v. Campbell**, 162 So.2d 233, ruled that it was mandatory to transport pupils only to **consolidated schools**. The court indicated that a local board might provide in its discretion for the transportation of pupils to other public schools. It did not, however, decide this question.

The result of this decision by the Supreme Court of Alabama may be that many of the opinions of this office relative to the use of school busses are in error.

Once again, the specific recommendation is made that school authorities obtain proper legislation authorizing and defining the proper use of school busses.

The answer to Question 1, in view of what has been said above, is that your local board must determine if the contemplated use meets the test stated in this and other opinions of this office to the effect that the use for the transportation of pupils must be in furtherance of an approved course of study prescribed and recognized by the State Board of Education or in furtherance of an approved educational program.

Generally, boards of education, such as yours, are not liable in tort for the acts of their servants or agents. Other than this general statement, no specific answer may be given to Question 2, in the absence of specific facts. Each case may differ as to how and why the accident happened. Was the vehicle defective? Did the Board know this? Was the driver a known incompetent driver? What is his age? Was the school bus being used for purposes within the rule stated? All these and more prevent any one specific statement as to liability.

The answer to Question 3 is in the negative under the plain reading of the Statute.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

June 26, 1964

Honorable Carl H. Merrill
Attorney
Cleburne County Commissioners' Court
Heflin, Alabama

Counties — Agriculture and Industries — Watersheds.

County may legally appropriate monies from the county general fund to watershed conservancy districts for the purpose of acquiring lands or easements for the construction of flood water retarding structures.

Opinion by Assistant Attorney General O'Rear.

Dear Sir:

I have your request for an official opinion dated June 19, 1964, which is as follows:

"The Court of County Commissioners of Cleburne County has asked us to request an opinion from you as to whether or not said Court of County Commissioners is authorized to use monies from any of the funds under its control to aid Watershed Conservancy Districts in said County in acquiring lands and/or easements upon lands for the construction of floodwater retarding structures, the construction of which helps to protect roads and bridges maintained by the County in the areas involved."

It is my opinion that Cleburne County may legally appropriate monies to watershed conservancy districts from any monies available in the county general fund for the purpose of acquiring lands and/or easements for the construction of floodwater retarding structures.

Your attention is directed to Title 12, Section 12, Code of Alabama, Recompiled 1958, which I quote in part as follows:

"The court has authority...22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor and all other resources of every kind of their respective counties..."

Subsection 22, supra, specifically authorizes the county to appropriate its funds for the purpose of developing and promoting resources of every kind within the county. The appropriation of monies by Cleburne County to watershed conservancy districts within Cleburne County for the control of floodwaters clearly is for the purpose of

developing and promoting agricultural and other resources within the county, as well as for the protection of county roads and bridges which, in themselves, are a county resource. See Quarterly Report of Attorney General, Volume 15, page 341; Quarterly Report of Attorney General, Volume 25, page 15; and Quarterly Report of Attorney General, Volume 49, page 12; Quarterly Report of Attorney General, Volume 75, pages 28, 37.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 30, 1964

Hon. W. Elsworth Haughton

Register

Circuit Court of Mobile County

Mobile, Alabama

Funds — Depositories — Register of Circuit Court —
Counties — Federal Savings.

Federal Savings and Loan Associations are not banks or trust companies in the sense that they are proper depositories for Registers of Circuit Courts in which such officers may deposit monies coming into their hands as such officers.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of June 18, 1964, is as follows:

"As Register of the Circuit Court of Mobile County, Alabama, I quite often serve as custodian for funds belonging to several different parties. I quite often deposit these funds with Savings and Loan Associations which are insured by the Federal Savings and Loan Insurance Corporation.

"Section 561.2 of the Rules and Regulations for Insurance of Accounts of the Federal Savings and Loan Insurance Corporation provides in part as follows:

"'. . . In the event the funds of more than one trust estate, such trust estate being the interest of each beneficiary in such trust

funds, are invested by the fiduciary in one insured account in an insured institution and the interest of each particular trust estate in such insured account is disclosed upon the records of the insured institution or upon the records of the fiduciary maintained in good faith and in the regular course of business, each such trust estate will be considered as a separate insured account as disclosed upon such records . . .'

"I presently am serving as custodian of funds in an estate where the funds on hand substantially exceeds \$10,000.00. The Judge of the Circuit Court has by decree of the Court fixed the amount due to various parties in the case. The records in my office maintained in the regular course of business reflect the name of each such party and the amount due such party.

"Please advise me whether a deposit in excess of \$10,000.00 in an insured savings and loan association would be covered by the insurance provisions of the Federal Savings and Loan Insurance Corporation where the amount due any one beneficiary does not exceed the sum of \$10,000.00.

"I would appreciate your rendering me an official opinion on this matter."

Section 561.2 of Rules and Regulations for Insurance of Accounts of Federal Savings and Loan Corporation promulgated February, 1964, provides in part:

"... In the event the funds of more than one trust estate, such trust estate being the interest of each beneficiary in such trust funds, are invested by the fiduciary in one insured account in an insured institution and the interest of each particular trust estate in such insured account is disclosed upon the records of the insured institution or upon the records of the fiduciary maintained in good faith and in the regular course of business, each such trust estate will be considered as a separate insured account as disclosed upon such records. In the event a fiduciary invests in one insured account funds of more than one trust estate which are commingled, each such trust estate in such insured account will be considered as a separate insured account for an amount determined by apportioning the total amount in the insured account to the trust estates having an interest therein upon the same ratio as the interest of such trust estates in the total commingled fund out of which the investment was made by the fiduciary."

From a reading of this regulation, it would appear that a fiduciary may have funds of more than one trust estate invested in such Federal Savings and Loan Association, the interest of each particular trust being

shown on the records of the association or on the records of the fiduciary as set out and each trust estate be considered a separate insured account.

However, your attention is directed to Section 561.5 of Rules and Regulations for Insurance of Accounts which reads as follows:

“§ 561.5 Account of insured member.—An ‘account of an insured member’ is the total amount credited (or when dividends are not credited, apportionable after having been apportioned to a series) to any member in withdrawable or repurchasable accounts, whether or not such accounts are subject to any pledge, whether or not such accounts are insured in full, and whether or not dividends are subject to recapture. The total insurance which any insured member may have in any one insured institution is \$10,000, whether the insured member has one or more insurable accounts. If such insurable accounts are of different character, the Corporation reserved the right to determine upon payment of insurance which of such accounts shall carry the \$10,000 aggregate of insurance.”

This indicates that the total insurance on the custodial account referred to in your request is \$10,000.00.

Under Title 12, Section 4, Code of Alabama 1940, as amended by Act No. 634, General and Local Acts 1949, page 975, the following is provided:

“Upon the application of the county tax collectors, county treasurers, probate judges, circuit court clerks, or registers of the circuit court, it shall be the duty of the court of county commissioners, boards of revenue, or other like governing body of the county to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such court, board of revenue or other governing body. Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the state.”

It has been said that the primary and ordinary conception of a trust company is a corporation or institution organized to take and administer trusts rather than carry on the ordinary functions of banking. A bank, on the other hand, is usually conceived of as an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue bank notes. 9 C. J. S., Banks and Banking, Section 1044.

In my opinion, Federal Savings and Loan Associations are not banks or trust companies within the purview of Title 12, Section 4, Code of Alabama 1940, as amended, in the sense that they are not the authorized depositories for registers of circuit courts in which such officers may deposit monies coming into their hands as such officers. Quarterly Report of Attorney General, Vol. 77, page 33.

In view of the fact that a Federal Savings and Loan Association is not a legal depository for such funds your question is moot.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

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Deposits — Release	Mary T. Garner	May 28	Dept. of State Treas.
Deposits — Release	Mary T. Garner	May 28	Dept. of State Treas.
Deposits — Release	Mary T. Garner	June 10	Dept. of State Treas.
Deposits — Release	Mary T. Garner	Jun. 10	Dept. of State Treas.
Deposits — Release	Mary T. Garner	Jun. 29	Dept. of State Treas.
Name — Change	Mary T. Garner	Jun. 10	Dept. of State Treas.
Property — U.S.S. Alabama	Stephen C. Croom	Apr. 29	581

MUNICIPALITIES

Civil Service Board — Reconsideration	Les Gilliland	Jun. 15	732
Dormant — Reinstatement	Ashford Todd	Apr. 3	203
Employee — Library Board	Carlton C. Rochell	May 14	636
Employees — Retirement	Earl D. James	Apr. 23	268
Employees — Retirement	Earl D. James	Jun. 17	268
Licenses — Trading Stamps	Arnold Tekes	May 20	663
Water Systems — Appropriations	James Record	Apr. 9	518

OFFICERS AND OFFICES

County Attorney — Councilman	J. Gorman Houston, Jr.	Jun. 4	601
County Superintendent of			
Education — Compensation	Alton Burns	Jun. 30	765
Highway Patrol — Retirement	Albert J. Lingo	Apr. 15	Dept. Public Safety
Legislator — Mayor	Fred H. Davis	Apr. 20	562
License Inspector — Mayor	C. C. Hodge	Apr. 29	538

Municipalities — Candidates			150
Notaries Public — Elector	Walter V. Cofield	Apr. 7	
Police Chief — Salary	Estes R. Flynt	Jun. 26	741
Tax Assessor — Death	City Council of Prichard	Apr. 7	517
Town Clerk — Removal	George D. Johnston	May 7	607
	E. B. Thomas	Jun. 5	720

PUBLIC UTILITIES

Municipalities — Relocation of lines			
Municipalities — Taxation	E. B. Adams	May 4	598
Water Systems — Penalties	Charles H. Younger	Jun. 15	743
	George T. Mills, Jr.	May 8	642

SCHOOLS

Bequests — D.A.R.	John L. Bowman	May 1	577
City Board of Education — Federal Reservations	Edgar W. Branyon	May 26	
City Board of Education — Federal Reservations	Edgar W. Branyon	Jun. 7	659
Interest — Contractors	George W. Long	May 12	659
Municipalities — Appropriations	F. Holmes Sanders	Apr. 15	625
State Department of Education — Indebtedness	Troy C. Tullis	May 27	541
Students — Marriage	Melton B. Wallace	May 18	664
Students — Marriage	H. R. Leeman	May 21	643
Teachers — Employment	Robert E. Cunningham	Apr. 8	662
			510

SMALL LOANS

Interest — Amounts	G. Sage Lyons	May 4	597
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Subject Matter	Name of Addressee	Date	File No.
STATE AND STATE DEPARTMENTS			
Alabama Building Corporation —			
Janitor Service	A. R. Meadows	May 1	Dept. of Ed.
Corrections and Institutions —			
Purchases	A. Frank Lee	May 18	Bd. of Corrections
Corrections and Institutions —			
Utilities	A. Frank Lee	May 15	Bd. of Corrections
Garnishments — Teachers Colleges	Houston Cole	Apr. 28	566
TAXATION			
Filing Tax — Cooperative			
Associations	T. C. Almond	Jun. 2	58
Hospitals — Doctors	G. F. Browning, Jr.	May 29	678
Insurance — Refund	Charles V. Hendley	Apr. 16	556
Licenses — Contractors	Murry W. Beasley	May 14	Bd. of Contractors
Sales — Photographers	Bob Okin	Jun. 22	738
Securities Commission — Fees	J. Breck Gantt	Apr. 7	Dept. of Atty. Gen.